

HUMANITARIAN LAW AND HUMAN RIGHTS LAW: THE POLITICS OF DISTINCTION

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* Associate Professor, Department of Law, American University in Cairo. I am thankful to David W. Kennedy for his constant support and irremediably insightful critique, and to Martti Koskeniemi for an equally friendly and equally unforgiving engagement with arguments explored below. To the latter, I owe special thanks for inviting me to be acting professor of international law at the University of Helsinki in the Spring of 2010, which gave me an incomparable academic haven to finalize this text. I am grateful also to Toni Pfanner, formerly Head of the Legal Division of the International Committee of the Red Cross, for inciting me to begin the conversation below, and for his detailed engagement with earlier versions of the argument. But above all, my gratitude goes to Tanya M. Monforte, for attempting, and thankfully succeeding at times, to force analytic reason into the meanders of my explanations at many junctures. Bright individuals have provided helpful research assistance along the way, and I owe them thanks for their work and patience: Amanuel Abraham, Jeroen Jansen, Jesse McClelland, and Austin Powers. Last but certainly not least, I am indebted to Scott Nowak, Managing Editor, as well as his invisible yet industrious team of editors, for professionally, generously and gracefully bearing with me, my text, my style and my footnotes.

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Humanity is the sovereignty which has been offended and a tribunal is convoked to determine why.[†]

War is essentially an evil thing.^{††}

A QUESTION OF DEFRAGMENTATION

The relationship between international humanitarian law and human rights has been made into an issue of scholastic debate.¹ As it ultimately

[†] United States v. Ohlendorf (*The Einsatzgruppen case*), 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 497 (1949).

^{††} Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences, (Oct. 1, 1946), 41 AM. J. INT'L L. 172, at 186 (1947).

1. Among the many thousand pages on the topic, one could start with the special issue of the INTERNATIONAL REVIEW OF THE RED CROSS devoted to "Human Rights," which contains some articles that will be referred to here. See generally 90 INT'L REV. RED CROSS 1 (2008). Some useful references for this general discussion, given the limited nature of the engagement with the topic here, are: Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 33 INT'L REV. RED CROSS 94 (1993); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Conflict*, 98 AM. J. INT'L L. 1 (2004); Theodor Meron, *The Humanization of International Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000); Robert Quentin-Baxter, *Human Rights and Humanitarian Law – Conflict or Confluence?* 9 AUST. YBIL, 94–112 (1985); Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 AM. U. L. REV. 935 (1982); César Sepúlveda, *Interrelationships in the Implementation and Enforcement of International Humanitarian Law and Human Rights Law*, 33 AM. U. L. REV. 117 (1983); Louise Doswald-Beck, *Human Rights and Humanitarian Law: Are There Some Individuals Bereft of all Legal Protection?*, 98 ASIL PROC. 353 (2004); Christine Byron, *A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, 47 VA. J. INT'L L. 839 (2007); Cordula Droegge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310 (2007) [hereinafter Droegge, *Interplay*]; David Kretzmer et. al, *International Humanitarian Law and International Human Rights Law: Exploring*

concerns issues of legitimate violence, life and death, the legal questions posed by that debated relationship need to be rescued from the grips of legal idealism, and their political content recovered in the process. Triggering a conversation around this project is the main objective of this contribution. Highlighting the political fabric of the type of technocratic policy-making based on one understanding of that relationship is the particular angle that will be taken to initiate the discussion.

Whatever the answer that will ultimately be preferred, the question of a relationship between human rights and humanitarian law rests always on a series of premises. First, we are in the presence of two presumably identifiable objects, understood as two normative systems or two areas of practice, with presupposed distinctive traits. Second, the distinctiveness is related to some internal coherence, which permits a determination of what is included in each one of them. Third, some form of relationship is possible, which in turn suggests a fundamental or overarching commonality that allows for comparison, contradistinction, and other ways of juxtaposing those two objects of study and practice. In contemporary international law, those premises make the present question to fall into the more general issue of “fragmentation” of international law.² That notion refers to the accelerating proliferation and diversification of international rules, which has raised for some the specter of looming contradictions, conflicts,

Parallel Application, 40 ISR. L. REV. 306 (2007); Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 MIL. L. REV. 1 (2007); Nancie Prud'homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISR. L. REV. 356 (2007); William A. Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum*, 40 ISR. L. REV. 592 (2007); Alexander Orakhelashvili, *The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism or Convergence?*, 19 EUR. J. INT'L L. 161 (2008); Richard Baxter, *Human Rights in War*, 31 BULL. AM. ACAD. ARTS & SCI. 4 (1977); Heike Krieger, *A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. CONFLICT & SEC. L. 265 (2006); Ruona Iguyovwe, *The Inter-play Between International Humanitarian Law and International Human Rights Law*, 34 COMMW. L. BULL. 4, 749 (2008); Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 80 INT'L REV. RED CROSS 481 (1998); Hans-Joachim Heintze, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, 86 INT'L REV. RED CROSS 789 (2004); HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, FROM LEGAL THEORY TO POLICY TOOLS: INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW IN THE OCCUPIED PALESTINIAN TERRITORY (2007). An interesting book-length study on the topic, framed by the general idea that an important structural difference between IHL and IHRL as normative frameworks lies in the legal position of the individual as a holder of rights or obligations, is RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 116 (2002).

2. Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Rep. of the Study Grp. of the Int'l Law Comm'n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 (2006) [hereinafter Fragmentation of International Law].

overlaps and other difficulties in their coexistence and concurrent operation.³ Among those problems, some are of a normative kind, as when two rules appear to say different things on the same issue.⁴ And some are of an institutional kind, as when two institutions appear to say different things about the same issue.⁵ When they meet, we have the mixed kind where specialized institutions appear to fragment issues by ignoring rules outside of their specialization.⁶ The term “fragmentation” suggests a passing or lost unity among the emerging fragments, and it is generally approached as a problem to be managed. Proposed solutions should have as an aim to help recover the lost unity, by confirming the existence of an actual system, either on normative grounds or institutional grounds, or both. From that perspective the coexistence of human rights law with humanitarian law has been a paradigmatic case in the fragmentation debate, both in terms of the issues it raises in concrete situations where the law is applied, and in terms of the general legal strategies designed to address those issues.

3. Among the abundant literature on the topic, one can start with some of the contributions to the Symposium on “Diversity or Cacophony? New Sources of Norms in International Law” published by the Michigan Journal of International Law in 2004. See in particular Gerhard Hafner, *Pros and Cons Ensuing From Fragmentation of International Law*, 25 MICH. J. INT’L L. 849 (2004); Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT’L L. 903 (2004); Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?*, 25 MICH. J. INT’L L. 929 (2003-2004); Mario Prost & Paul Kingsley Clark, *Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?*, 5 CHINESE J. INT’L L. 341 (2006). For discussions of fragmentation as it affects specific fields of practice, see for example August Reinisch, *The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: Festschrift in Honour of Gerhard Hafner 107–26 (Isabelle Buffard et al. eds., 2008); Harro Van Asselt et al., *Global Climate Change and the Fragmentation of International Law*, 30 LAW & POL’Y, 423 (2008); Alexander Orakhelashvili, *The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 EUR. J. INT’L L. 161 (2008).

4. Under that generic label one finds a series of issues, such as conflicts between successive norms, conflicts between so-called universal (or general) and regional (or special) norms, or conflicts between overlapping treaty regimes. These are dealt with in the bulk of the ILC’s fragmentation report. See *Fragmentation of International Law*, *supra* note 2, ¶¶ 46–294.

5. The fragmentation report mentions for instance the fact that the European Court of Human Rights (and then other human rights bodies) understands itself as institutionally different from the International Court of Justice, which justifies differentiating its practice regarding the European Convention from the general practice of the ICJ regarding international treaties, including human rights treaties. See *id.* ¶ 131.

6. As noted in the fragmentation report, the twin issues of normative and institutional fragmentation (otherwise labeled as substantive conflicts and jurisdictional conflicts) appear frequently in debates concerning international trade law. See *id.* ¶¶ 165–85.

On that basis, the pages below argue in favor of fragmentation. The relationship between human rights and humanitarian law is approached from the perspective of trends or ideas that actually suggest their defragmentation, that is, their variously defined or even explicit integration into a greater whole.⁷ Given that all talk about fragmentation is at the same time a set of propositions about the type of unity that exists or existed among the fragments, and the way in which the loss of unity is understood, the argument below favors one type of fragmentation, *i.e.* substantive or normative fragmentation, against the backdrop of a particular type of formal commonality, *i.e.* common belonging to the political system of international law. In other words, one side of the argument seeks to entrench the notion that human rights and humanitarian law are distinct fragments, in the sense of being separate parts of a greater whole. In terms of being distinct parts, each one has its own internal dynamics and structural orientation (or bias);⁸ and in terms of belonging to a whole, they share the common ground that allows for the discussion of their coexistence. The other side of the argument seeks to justify the entrenchment of both legal distinctness and commonality as necessary from the perspective of international law as a political discourse on government. Conversely, thereby, the argument suggests that any handling of the relations of human rights and humanitarian law that glosses over their difference in sameness needs to become aware of itself as part of an alternative political discourse to that of international law. The present contribution therefore weighs in a tangential way on the variety of arguments that try to make sense of the relationship between these two bodies of law, by focusing on the legal frame within which that debate occurs, and what it leaves out of the conversation.

I proceed as follows. The premise is that distinct legal regimes have loose but distinct normative bents, or structural biases. Although the structural bias does not overrule the possible inner contradictions of each regime, I proceed first (Part II) to boiling down both bodies of rules to what could arguably be seen as their respective animating principles: distinction

7. For a critical reading of the spirit in which such merger happens, see Ruti G. Teitel, *For Humanity*, 32 J. HUM. RTS. 225 (2004) (describing the progress of a narrative of “humanity” as the flipside of the traditional internationalist discourse of State sovereignty). Professor Teitel has pursued a larger project of describing the transformation of the international legal order through the progressive meeting of human rights and humanitarian law, as well as the expansion of international criminal law. For instance, *see, e.g.*, Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355, at 359 (2001) [hereinafter Teitel, *Humanity's Law: Rule of Law*] (noting that “the most pronounced change in the international legal system is the dramatic expansion of humanitarian law's reach through its merger with international human rights law and its attendant implications for global rule of law.”). *See also* Ruti G. Teitel, *Humanity Law: A New Interpretive Lens on the International Sphere*, 77 FORDHAM L. REV. 667 (2008).

8. Martti Koskeniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT'L L. 7, 12 (2009) (describing the challenge of the fragmentation era as one of choice between structurally biased regimes).

for humanitarian law (Section A), and non-discrimination for human rights (Section B). I suggest that these separate and apparently contradictory principles are both rooted in the same political liberal tradition, which I evoke through the use of loose social contract imagery in the description of both distinction and non-discrimination. That leads me, in the spirit of the era of fragmentation, to revisit some judicial encounters with the relationship between human rights and humanitarian law (Part III). Starting with the canonical moment when the International Court of Justice suggested the interpretive principle of *lex specialis* as a panacea (Section A), I move to an examination of the respective case law related to humanitarian law in the three regional human rights systems—Europe (Section B), the Americas (Section C) and Africa (Section D). Paying close technical attention to that practice will serve to give some depth, through the variety of situations and particular position of human rights bodies, to the implicit connection between *lex specialis* and jurisdiction, that is, formal sovereignty. Once the political form of sovereignty is put back in place as the basis for the *lex generalis* / *lex specialis* trope—and therefore also the argumentative line between peace and war—concluding thoughts will follow concerning the political message of defragmentation.

I. A QUESTION OF PRINCIPLES

The basic starting point in the received conversation about the relations between human rights and humanitarian law is that one is obviously considering some form of relationship between two distinct bodies of rules. Whatever the preferred outlook and conclusions reached—and regardless of the depth and nature of the relationship that is thus presented—the discussion inevitably starts from a received boundary. Jurisprudentially, standard legal keywords in the discussion, such as “complementarity” or *lex specialis*, suggest that there is proximity but never conflation.⁹ In terms of the realities of the field, the relationship will in turn refer to institutional examples of proximity, such as the turn of quintessentially “human rights” organizations towards humanitarian law for their work, within which such organizations will speak of humanitarian law rather than human rights, whereas, precisely because they are human rights organizations, one will assume that it is still somehow human rights work.¹⁰ And conversely, the

9. E.g. Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT'L REV. RED CROSS 501, 521 (2008) [hereinafter Droege, *Affinities*] (“It is thus clear from the outset that a complete merging of the two bodies of law is impossible. It is natural, therefore, that the approach in jurisprudence and practice is rather that human rights and humanitarian law are not mutually exclusive, but complementary and mutually reinforcing.”). See also Teitel, *Humanity's Law: Rule of Law*, *supra* note 7.

10. See, e.g., HUMAN RIGHTS WATCH, UP IN FLAMES: HUMANITARIAN LAW VIOLATIONS AND CIVILIAN VICTIMS IN THE CONFLICT OVER SOUTH OSSETIA (2009).

relationship will be also exemplified by the primordial humanitarian law organization, the International Committee of the Red Cross (ICRC) and its cautious engagement with human rights law,¹¹ both in the type of field work that leads it to cross the armed conflict / peace divide,¹² and through its presence as a permanent observer at the sessions of the United Nations Commission on Human Rights (later replaced by the Human Rights Council)—an institutional presence that would suggest at least some subjective sense of mutual relevance.¹³

The depth of the boundary between human rights law and humanitarian law is sometimes, especially for didactic purposes, posited in historical terms. According to received narratives, the contemporary shape of

11. See Sergey Sayapin, *The International Committee of the Red Cross and International Human Rights Law*, 9 HUM. RTS. L. REV. 95 (2009). As Toni Pfanner notes, in his editorial for the special issue of the International Review of the Red Cross devoted to human rights, “[t]oday, nobody questions that international humanitarian law and international human rights law apply during armed conflict and that the two bodies of law are complementary and influence each other.” See Toni Pfanner, *Editorial*, 90 INT’L REV. RED CROSS 485 (2008) (emphasis added). Pfanner also explains the reluctance of the ICRC to engage too openly with human rights for fear of “politicization”. *Id.* at 488. The involvement of the ICRC in a variety of situations based on its “right of initiative” recognized through the Red Cross and Red Crescent Movement leads it into non-traditional contexts that lend themselves to the invocation of human rights standards. See Statutes of the International Red Cross and Red Crescent Movement, adopted by The 25th International Conference of the Red Cross at Geneva (Oct. 1986), amended by The 26th International Conference of the Red Cross and Red Crescent at Geneva (Dec. 1995) and by The 29th International Conference of the Red Cross and Red Crescent at Geneva (June 2006), art. 5(3), available at <http://www.icrc.org/eng/resources/documents/misc/statutes-movement-220506.htm> (stating that “[t]he International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution.”). Given the position of the ICRC on the “War on Terror,” it is significant that the ICRC report on the treatment of “War-on-Terror” detainees in the detention centers of the United States’ Central Intelligence Agency (a confidential report that was, however, leaked to the press in April of 2009) contained references to the violation of both humanitarian law and specific rules of human rights law applicable to detention situations. See Mark Danner, *The Red Cross Torture Report: What It Means*, 56 N.Y. REV. BOOKS, Apr. 30, 2009, available at <http://www.nybooks.com/articles/archives/2009/apr/30/the-red-cross-torture-report-what-it-means/>.

12. “The ICRC strives to ensure that the rank and file of armed, security and police forces know and apply IHL and human rights law as they go about their daily work, and that other weapon bearers respect IHL and support, or refrain from actively opposing, humanitarian action.” *E.g.*, INT’L COMM. OF THE RED CROSS, ANNUAL REPORT 2008, at 48 (May 2009) (emphasis added). The ICRC is generally active also on the front of disseminating rules of conduct to all agencies that wield the State’s power of physical coercion. See, *e.g.*, INT’L COMM. OF THE RED CROSS, GUIDE FOR POLICE CONDUCT AND BEHAVIOR (2004).

13. Observer Status for the International Committee of the Red Cross, in Consideration of the Special Role and Mandates Conferred Upon it by the Geneva Conventions of 12 August 1949, U.N. Res. 45/6, U.N. Doc. A/RES/45/6 (Oct. 16, 1990). On that peculiar status, see Christian Koenig, *Observer Status for the ICRC at the United Nations: A Legal Viewpoint*, 73 INT’L REV. RED CROSS 37 (1991).

international human rights law¹⁴ is informed by the foundational mold of the 1948 Universal Declaration¹⁵ and, behind it, the Charter of the United Nations¹⁶—although prehistoric roots extend deeper back in time to encompass League of Nations era experiences such as the minority regimes¹⁷ and scattered winks by the Permanent Court of International Justice,¹⁸ and some would extend those roots to a variety of moral, religious, or philosophical systems that have supposedly shaped the idea of “human rights.”¹⁹

International humanitarian law, in turn,²⁰ would emerge in its modern codified form from, on the one hand, the St. Petersburg Declaration of 1868²¹ and the Hague peace conferences of 1899 and 1907,²² and—on the other hand—the historical development of the system of the Geneva Conventions since 1864²³ down to 1949 and beyond.²⁴ This schematized

14. For an attempt at presenting the evolution of human rights thought and practice since antiquity, see Dinah L. Shelton, *An Introduction to the History of International Human Rights Law* (Geo. Wash. Legal Stud. Working Paper No. 346, 2007), available at <http://ssrn.com/abstract=1010489>. For more de-centered takes, see Berdal Aral, *The Idea of Human Rights as Perceived in the Ottoman Empire*, 26 HUM. RTS. Q. 454–82 (2004); Reza Afshari, *On Historiography of Human Rights — Reflections on Paul Gordon Lauren’s the Evolution of International Human Rights: Visions Seen*, 29 HUM. RTS. Q. 1–67 (2007)

15. See generally Universal Declaration of Human Rights 71, G.A. Res. 217A (III), U.N. Doc A/810 (1948) [hereinafter UDHR].

16. See generally U.N. Charter pmb1, ¶ 3 and art. 1, ¶ 3.

17. See Mark Mazower, *The Strange Triumph of Human Rights, 1933–1950*, 47 HIST. J. 379 (2004). On the experimental legal architecture of the time, see Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy and the Limits of the Interwar Framework*, 33 HARV. INT’L L.J. 353 (1992).

18. An important moment in that retrospective narrative would be the Permanent Court of International Justice’s involvement in seemingly novel issues relating to international law’s entanglement with constitutional questions relating ultimately to the protection of individual freedoms. See *Conformity of Certain Legislative Decrees with the Constitution of the Free City, Advisory Opinion*, 1935 P.C.I.J. (ser. A/B) No. 65, at 41 (Sept. 4). The retrospective reading would then be reinforced by the powerful defense of a seemingly “traditionalist” vision of interstate international law in Judge Anzilotti’s dissent. See *id.* at 60 (Anzilotti, J., dissenting).

19. See, e.g., BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* (1997); ROGER RUSTON, *HUMAN RIGHTS AND THE IMAGE OF GOD* (2004).

20. For the ICRC’s own version of the history of international humanitarian law, see *What Are the Origins of International Humanitarian Law?*, INT’L COMM. RED CROSS (Jan 1, 2004) <http://www.icrc.org/web/eng/siteeng0.nsf/html/5KZFR8>. See also Howard S. Levie, *History of the Law of War on Land*, 82 INT’L REV. RED CROSS 339 (2000); LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICTS* 18–51 (1993).

21. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29, 1868 [hereinafter St. Petersburg Declaration], reprinted in INT’L COMM. OF THE RED CROSS, *RULES OF INTERNATIONAL HUMANITARIAN LAW AND OTHER RULES RELATING TO THE CONDUCT OF HOSTILITIES* 159.

22. E.g. Geoffrey Best, *Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After*, 75 INT’L AFF. 619, 625 (1999).

23. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 129 Consol. T.S. 361.

bifurcation is what is used to didactically separate humanitarian law into two subgroups of rules.²⁵ Out of the 1899–1907 time period comes the lineage of the laws of war referred to as “Hague Law,”²⁶ that is, the rules governing means of warfare (weapons and weapon systems such as antipersonnel lasers,²⁷ asphyxiating gas²⁸ or cluster ammunition²⁹) and

24. The four Geneva Conventions of 1949 are, in their traditional order: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GCI]; Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at the Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GCII]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GCIII]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter GCIV]. The two Additional Protocols are: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter API]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter APII]. The third Additional Protocol to the Geneva Conventions will not be referred to as frequently *infra* as the two others due to its more specific purpose and contents. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), *opened for signature* Dec. 8, 2005, 2404 U.N.T.S. 261 (entered into force Jan. 14, 2007) [hereinafter APIII].

25. See, e.g., GREEN, *supra* note 20, at 328; YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 12 (2004); Richard John Erickson, *Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict*, 19 VA. J. INT'L L. 577 (1979); Robert Cryer, *Hague Law Comes Home: Prosecuting Weapons Offences at the International Criminal Court*, 2003 ACTA JURIDICA 238.

26. It should be noted that the labels “Geneva Law” and “Hague Law” have a conventional meaning within international humanitarian law. That is what I am referring to here. The terms are sometimes used in a different way. “Geneva Law” has sometimes been used, especially recently, to refer to international humanitarian law as such. See, e.g., Aya Gruber, *Who's Afraid of Geneva Law?*, 39 ARIZ. ST. L.J. 1017 (2007). Hague Law is sometimes used to refer exclusively to international law contained in the Hague Conventions of 1899 and 1907, which extends it beyond “Hague Law” *stricto sensu* and into “Geneva Law” issues (such as the treatment of POWs), but also extends it beyond the confines of humanitarian law as a whole and into the domain of peaceful dispute resolution. See, e.g., Peter J. Van Krieken & David McKay, *Introduction to THE HAGUE: LEGAL CAPITAL OF THE WORLD* 3, 13 (Peter J. van Krieken & David McKay eds., 2005).

27. Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects: Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices (Protocol II) as Amended, and Protocol on Blinding Laser Weapons (Protocol IV), 35 I.L.M. 1206, 1218 (1996) (entered into force July 30, 1998).

28. Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, June 17, 1925, 94 L.N.T.S. 65 (entered into force Feb. 8, 1928).

29. Convention on Cluster Munitions, *opened for signature* Dec. 3, 2008, 48 I.L.M. 354 (entered into force Aug. 1, 2010).

methods of warfare (tactics such as the manipulation of hunger³⁰ or fear³¹ among the enemy's civilian population, the use of treachery³² or perfidy³³ against enemy combatants, or the manipulation of the environment for hostile purposes,³⁴ and possibly the extension of war tactics to the use of the cyberspace or "cyber weaponry").³⁵ Out of 1864 comes the other branch of humanitarian law, the so-called "Geneva Law," which governs in essence the treatment of "protected persons," that is, persons who are generally in the hands of the enemy Power (such as civilians in occupied territory or prisoners of war in the case of international conflicts).³⁶ Beyond that more contemporary lineage, humanitarian law is also—as a notoriously archaic branch of international law—echoed in pre-modern normative systems, such as codes of chivalry,³⁷ and various religious traditions,³⁸ infiltrating from there also the literary canon.³⁹

The foregoing only serves to suggest that the distinctiveness of both human rights and humanitarian law is traditionally presented in terms of origins, regardless of whether those historical narratives are convincing or

30. API, *supra* note 24, arts. 54(1), 54(2), 54(3); APII, *supra* note 24, art. 14; Rome Statute of the International Criminal Court, art. 8(2)(b)(xxv), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (*entered into force* July 1, 2002) [hereinafter Rome Statute].

31. API, *supra* note 24, at art. 51(2); APII, *supra* note 24, art. 13(2).

32. Rome Statute, *supra* note 30, art. 8(2)(e)(xi).

33. API, *supra* note 24, art. 37.

34. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 1108 U.N.T.S. 151.

35. See, e.g., Jeffery T.G. Kelsey, *Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare*, 106 MICH. L. REV. 1427 (2008); Scott J. Shackelford, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, 27 Berkeley J. Int'l L. 192, 213–14 (2009). Some suggest that existing law is precisely not adapted for the extension of war operations onto cyber terrain. See, e.g., Duncan B. Hollis, *Why States Need an International Law for Information Operations*, 11 LEWIS & CLARK L. REV. 1023 (2007).

36. The distinction between the two branches is helpful for didactic purposes and for clarifying, as done below, the idea of "distinction." As such it should be understood as a functional divide, not a historical reality. As the narrative of that historical evolution goes, the two branches are said to have been reunited in 1977 when the Additional Protocols included Hague Law into the Geneva corpus. Yet as we know, the 1907 Hague Regulations dealt already with the treatment of prisoners of war, long before the first Geneva Convention on the topic, adopted in 1929. See Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 U.N.T.S. 343. The merger was noted by the International Court of Justice. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 256 (July 8) [hereinafter *Nuclear Weapons Legality*].

37. See, e.g., MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* (1991). See generally THEODOR MERON, *BLOODY CONSTRAINT: WAR AND CHIVALRY IN SHAKESPEARE* (1998).

38. A classic example would be *THE ISLAMIC LAW OF NATIONS: SHAYBANI'S SIYAR* (Majid Khadduri trans., 1966). See also Michel Veuthey, *International Humanitarian Law and Spirituality*, 21 REFUGEE SURV. Q., Oct. 2002, at 45.

39. See, e.g., the now classic THEODOR MERON, *HENRY'S WARS AND SHAKESPEARE'S LAWS* (1993).

not. In all cases the backdrop to the issue of relating human rights and humanitarian law is one where the two bodies of law are recognized as separate, whether we look at it in terms of current practice or in terms of historical narratives. Only starting from that basic assumption can one then spot instances where they can be said to overlap in one way or another. Something that also is presented in terms of historical evolution, such as when humanitarian law has borrowed from the language of human rights,⁴⁰ or when human rights treaties have included rules which would seem to have a humanitarian law pedigree.⁴¹ As suggested above, the fact that they have a relationship—whatever the relationship—is thereby premised on their identifiable distinctness, and by the same token a commonality which triggers the question of their relationship in the first place.

If we move to the nature of that relationship, a variety of positions exist on the topic,⁴² and those possible relations have even been the objects of dispassionate doctrinal classification.⁴³ Instead of immediately entering the domain of that discussion, however, one can ask here why similar doctrinal production does not exist on the relationship between humanitarian law and

40. On the process of influence of human rights over humanitarian law, see generally Meron, *supra* note 1. A specific case of linguistic influence is that of API, *supra* note 24, at art. 75, which says that individuals not benefiting from better protection from the rest of humanitarian law are entitled to the “fundamental guarantees” listed in the provision, “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.” This is an important instance in the narrative of a convergence of purpose or motive of the two bodies of law. See, e.g., Doswald-Beck & Vité, *supra* note 1.

41. See Convention on the Rights of the Child, art. 38, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Id.

42. See sources cited *supra* note 1.

43. Robert Kolb, *Human Rights and Humanitarian Law*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, available at <http://www.mpepil.com..>

international trade law, or between humanitarian law and the law of international investment. Out of a disciplinary sense of obviousness the answer could arguably be: humanitarian law and human rights law share something in a way that has no parallel in humanitarian law's relationship—or even human rights law's relationship—to any other sub-body of international legal norms.⁴⁴ That it does not make that much sense to juxtapose international investment law and international humanitarian law means essentially that there is no immediately obvious practical or theoretical point of contact that would suggest the comparison or interrogation. From any legally relevant perspective, it would seem that they are—to say it simply—more different than they are the same. That is not the case apparently for our normative couple. If we try to pin down that something which connects human rights and humanitarian law more precisely, the available literature and legal commentary will quickly reveal a loosely consensual functionalist attitude. What they have in common is variously felt to be the objective that they serve⁴⁵ or—in a different version—the values that they embody.⁴⁶ They meet because they perform a

44. This sense of obviousness lies behind the use, most notoriously by the United Nations General Assembly for a long time but also by others, of expressions such as “human rights in armed conflict.” An early document adopting this terminology is the Resolution XXIII, Human Rights in Armed Conflicts, adopted by the International Conference on Human Rights in Teheran (May 12, 1968). See *Human Rights in Armed Conflicts, International Conference of Human Rights Resolution XXIII (May 12, 1968)*, reprinted in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 261, 261-62 (Dietrich Schindler & Jiri Toman eds., 1988). On the adoption of the expression by the General Assembly, see ERIC DAVID, *PRINCIPE DE DROIT DES CONFLITS ARMES* 83–84 (1st ed. 1994).

45. When speaking of human rights and humanitarian law, what is meant by a common goal is what some see as a shared mission of protecting the life and dignity of individuals, as evidenced for instance by a common prohibition of torture or common modalities of fair trial. See, e.g., Iguyovwe, *supra* note 1. That leads also to the issue of advocating further cooperation between, or integration of, the two sets of norms, for the purpose of achieving that common goal, particularly in situations of armed conflict. See, e.g., Elizabeth Mottershaw, *Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law*, 12 INT'L J. HUM. RTS. 449, 449-70 (2008).

46. That perspective is based on the notion that humanitarian law and human rights instruments both form part of the larger category of “humanitarian” provisions or treaties, which is mentioned in different parts of general international law, and are otherwise part of the group of “peremptory norms” (*jus cogens*). In the law of treaties, suspension or termination in response to a material breach of the treaty is not possible with regard to “provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.” See Vienna Convention on the Law of Treaties art. 60(5), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. In the law of State responsibility, countermeasures (considered a legitimate breach of the law in response to a prior violation) cannot affect three types of provisions: “the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations,” “obligations for the protection of fundamental human rights,” and

similar function,⁴⁷ albeit possibly in different ways, in different places, at different times, and maybe even for partially different reasons.

Beyond the details of the varied positions on the substantive meeting of the two bodies of law, the shared goal and purpose of the two sets of norms is usually stated in terms transcending immediate political references or controversy, like “common humanist ideal.”⁴⁸ The possibility of framing a non-political objective common to human rights and humanitarian law is significant because of what the label “political” may mean in the meeting of those two types of norms. One can think here of the ICRC’s long-held sense that human rights could be excessively close to politics for professional neutrality’s comfort⁴⁹—an attitude that had been shared, for functionally identical reasons, by the World Bank until recently.⁵⁰ The political element that appears here in humanitarian law’s encounter with human rights refers, as it does in the World Bank’s escape from the

“obligations of a humanitarian character prohibiting reprisals.” As the last subparagraph of that provision makes clear, what they have in common is that they are norms of *jus cogens*. In its commentary on the provision, incidentally, the International Law Commission itself uses the Geneva Conventions to illustrate the second type of norms (fundamental rights), presumably with the idea that what is illustrated is the general idea of not affecting fundamental interests of the international community while responding to a breach. See [2007] 2 Y.B. Int’l L. Comm’n 132, U.N. Doc. A/CN.4/SER.A/2001/Add.1. The Commission speaks of *jus cogens* as “[t]he obligations [that] arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.” See *id.* at 112. Because human rights and humanitarian law supposedly express or protect the same values, the general idea is that they should be looked at as one single type of norm under general international law, particularly for the sake of special treatment in the application of secondary rules, such as the rules of State responsibility and the law of treaties. See also Florentino Ruiz, *The Succession of States in Universal Treaties on the Protection of Human Rights and Humanitarian Law*, 7 INT’L J. HUM. RTS. 42 (2003).

47. The language of “complementarity” is one underpinned by such a perspective. See Laura M. Olson, *Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict*, 40 CASE W. RES. J. INT’L L. 437 (2009); Droege, *Interplay*, *supra* note 1, at 310–55; Maj. J. Jeremy Marsh, *Rule 99 of the Customary International Law Study and the Relationship Between the Law of Armed Conflict and International Human Rights Law*, 2009 ARMY LAW. 21, 21–22.

48. Droege, *Affinities*, *supra* note 9, at 503, 521.

49. See, e.g., Pfanner, *supra* note 11.

50. Roberto Dañino, Legal Opinion on Human Rights and the Work of the World Bank (Jan. 27, 2006), available at <http://www.if-watchnet.org/sites/if-watchnet.org/files/DaninoLegalOpinion0106.pdf>. (reversing settled interpretation of Article IV, Section 10, of the Articles of Agreement of the Bank, successfully imposed by former Vice-President and General Counsel Ibrahim Shihata). The General Counsel’s personal views can also be read in Roberto Dañino, *The Legal Aspects of the World Bank’s Work on Human Rights*, DEV. OUTREACH, HUM. RTS. & DEV. (Oct. 2006) <http://www.devoutreach.com/oct06/SpecialReport/tabid/1518/Default.aspx>.

political,⁵¹ to the baggage of international contestation that can plausibly be feared to come with the invocation of “human rights” themselves.⁵² At a political minimum, “human rights” as such evoke almost by definition the possibility of questioning the sovereign’s own prerogatives and responsibilities over its people and territory.⁵³ More specifically, however, “human rights” have been deemed too close to political controversy, as they are recurrently associated with the global North–West’s (neo)colonialisms,⁵⁴

51. Articles of Agreement of the International Bank for Reconstruction and Development, art. IV, ¶ 10, *opened for signature* Dec. 27, 1945, 16 U.S.T. 1942, 2 U.N.T.S. 134 (*entered into force* Dec. 17, 1965).

52. The association of human rights to politics takes a variety of forms. A common one is to present human rights in its connection with political and/or economic liberalism. *See, e.g.*, Paul J. Magnarella, *International Human Rights: Roots of a Progression*, 19 J. THIRD WORLD STUD., Fall 2002, at 13; Tony Evans, *If Democracy, Then Human Rights?*, 22 THIRD WORLD Q. 623 (2001); Anthony J. Langlois, *Human Rights and Modern Liberalism: A Critique*, 51 POL. STUD. 509 (2003).

53. This is how Antony Anghie describes the self-understanding of the human rights project in international law:

The emergence of international human rights law is characterized axiomatically, in virtually all the literature on the subject, as a revolutionary and unprecedented moment in the history of international law because it undermined the fundamental principle of territorial sovereignty, which had been in existence since the emergence of the modern European nation-state and the writings of Vattel.

Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT’L L. & POL. 545 (2002). In more external terms, given the period examined by Anghie, a psychological reading puts it more sharply: “We might understand the monumental significance of international human rights law in these terms: It enabled international law and institutions to enter the interior, to address the unconscious, and thereby to administer civilizing therapy to the body politic of the sovereign state.” *Id.* at 547. As far as the critique of human rights’ self-understanding is concerned, a useful and multi-faceted discussion of the grounding of human rights in a specific brand of political philosophy, among other things through a psychoanalytic reading, can be found in the now classic COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY* 147 (2000). A follow-up discussion, more oriented towards issues of globalization and war, is provided in COSTAS DOUZINAS, *HUMAN RIGHTS AND EMPIRE: THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* (2007). A particular line of criticism against the human rights discourse from an anticolonial perspective can be found in, for example, Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201 (2001), and Makau Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589 (1996). *See, e.g.*, UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS*, (Oxford University Press 2d ed. 2002) (providing the broad TWAIL constellation with a more subtly ambivalent take.); OBIORA CHINEDU OKAFOR, *LEGITIMIZING HUMAN RIGHTS NGOS: LESSONS FROM NIGERIA* (2006); and B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L CMTY. L. REV. 3–27 (2006).

54. Beyond the examples provided in Third-World-Approaches-to-International-Law literature, exemplified above by Antony Anghie, Obiora Okafor, and Makau Mutua, see

imperialisms,⁵⁵ universalisms,⁵⁶ and other outright political endeavors. In a specific perspective from within human rights work, considering human rights “political” can be seen as equivalent to soiling the project of human rights.⁵⁷ The ties to the political would lead to equating a “human rights” claim with a mere partisan claim—or worse—a gesture of disloyalty.⁵⁸ From such a perspective on “human rights,” being non-political and therefore immune from political indictment gives them in that sense even greater affinity with humanitarian law, in particular through their association with the meta-sovereign status of *jus cogens*,⁵⁹ *erga omnes*,⁶⁰ or

discussions of some historical dimensions of the political coexistence of human rights and colonialism in Kirsten Sellars, *Human Rights and the Colonies: Deceit, Deception and Discovery*, 93 THE ROUND TABLE, 709 (2004) and Alice L. Conklin, *Colonialism and Human Rights, A Contradiction in Terms? The Case of France and West Africa, 1895–1914*, 103 AM. HIST. REV. 419 (1998). See Note, *Saving Amina Lawal: Human Rights Symbolism and the Dangers of Colonialism*, 117 HARV. L. REV. 2365 (2004), for a discussion of neocolonialism in a recent case of North–South debate mediated by human rights.

55. Outside of legal analysis *stricto sensu*, an interesting association made between human rights and imperialism can be found in David Holloway, *The War on Terror Espionage Thriller, and the Imperialism of Human Rights*, 46 COMP. LITERATURE STUD. 20 (2009). The very first words of the essay explain its purpose as follows: “This essay describes the war on terror espionage thriller as a popular literary form which legitimates human rights abuses by the West, particularly state sanctioned torture, by depicting the West, rhetorically, as the virtuous bringer of rights.” *Id.*

56. Among an immense literature, some illustrative general references addressing the association of human rights with “universalism” can be mentioned: See generally Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child*, 25 HUM. RTS. Q. 130 (2003); Michael Freeman, *The Philosophical Foundations of Human Rights*, 16 HUM. RTS. Q. 491 (1994); Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 HUM. RTS. Q. 136 (1997); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984); Michael Freeman, *Human Rights and Real Cultures: Towards a Dialogue on ‘Asian Values’*, 16 NETHERLANDS HUM. RTS. Q., 25 (1998); Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 HUM. RTS. Q. 838–60 (2000); Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT’L J.L. POL’Y & FAM. 1 (1994); Michael J. Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 HUM. RTS. Q. 461 (1997); Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio–Cultural Contexts*, 16 HUM. RTS. Q. 740 (1994).

57. Apolitical conceptions of human rights as such can extract their apolitical character by taking on an ethical or moralizing form. For a particularly sharp critique of that discursive tradition in international relations, see DAVID CHANDLER, *FROM KOSOVO TO KABUL: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION* (2002).

58. See Valasquez Rodriguez Case, Inter-Am. Ct. H.R. (ser. C) No. 04, ¶ 114 (July 29, 1988). See also FIDH, *National Human Rights Organization (ONDH) and Rencontre Africaine pour la Defense des Droits de l’Homme (RADDHO) v. Senegal*, African Comm’n on Human & Peoples’ Rights Comm’n No. 155/96, 15th Activity Report, African Union, Executive Council, 10th sess., AU Doc. EX.CL/322 (X), § 3525–26 (2007).

59. As is already apparent in the International Law Commission’s cross-referencing of its own work between State responsibility and the law of treaties, the relationship between human rights and *jus cogens* is a topic of never-ending speculation, especially given the

non-derogable norms.⁶¹ As a result of the fact that humanitarian and human rights law therefore meet on presumably non-political ground, be it in the realm of technical practice⁶² or else values,⁶³ discussions of the relations of human rights to humanitarian law will not take into consideration the background of political contestation that has followed human rights since their post-war rebirth.⁶⁴

The process of defragmentation of those bodies of law is shown here to be intimately linked to a downplaying of their individual origins and

disagreement over whether Article 53 of the Vienna Convention on the Law of Treaties, which introduces formally the notion of *jus cogens* to international law, has effects beyond the law of treaties and more specifically the issue of invalidity of treaties. See [2007] 2 Y.B. Int'l L. Comm'n 132, *supra* note 46. The International Law Commission repeated in the context of the Law of State Responsibility what it had suggested about the contents of the body of *jus cogens* norms when it adopted Article 53 of the Vienna Convention. See Rep. of the Int'l Law Comm'n to the General Assembly, Rep. on its 53rd Sess., Apr.23–June 1, July 2–Aug.10, 2001, GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10, at 85, 112–113. For general remarks on the issue, see Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT'L L. 491 (2008). An important contribution discussing the not so arbitrary speculations about the contents of *jus cogens* is of course Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993).

60. In international law, *erga omnes* effects were first considered with regards to obligations. See the dictum of the International Court of Justice in *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5). The ICJ has however also accepted that rights, specifically the right of peoples to self-determination, can have an *erga omnes* character. See *East Timor (Port. v. Austl.) (East Timor Case)*, Judgment, 1995 I.C.J. 90, 102 (June 30). This was confirmed in: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Palestinian Wall)*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 155–56 (July 9), where the Court incidentally joins together *erga omnes* rights and *erga omnes* obligations (whereas they have legally speaking inverse effects one from the other), where the latter arise from humanitarian law. See *id.* ¶ 157. For a critique of the Court's use of the *erga omnes* label, see the individual opinion filed by Judge Rosalyn Higgins, *id.* ¶ 216 (Higgins, J., dissenting).

61. See *Coard v. United States*, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶¶ 38–44 (1999). Some compare human rights and humanitarian law based on the notion that "humanitarian law" can be meaningfully called "non-derogable" (which is at least debatable from a technical point of view if the term non-derogable is connected, as it is intimately in the context of human rights, to the notion of the state of emergency or necessity.) See Droegge, *Affinities*, *supra* note 9, at 521 ("[W]hile most international human rights are with few exceptions derogable, humanitarian law is non-derogable (with the sole exception of Article 5 of the Fourth Geneva Convention).")

62. See, e.g., Marco Sassòli & Laura Olsen, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT'L REV. RED CROSS 599 (2008).

63. That is the implicit basis for the notion that the "Asian values" debate, mentioned above in references relating to human rights universalism, may be of any relevance at all to humanitarian law. See Alfred M. Boll, *The Asian Values Debate and Its Relevance to International Humanitarian Law*, 83 INT'L REV. RED CROSS 45 (2001).

64. Apart from the just mentioned piece on "Asian values" in humanitarian law, one can also cite the occasional reintegration of "cultural relativism" into technical discussions of the laws of war. See, e.g., Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 Yale Hum. Rts. & Dev. L.J. 143, 151 (1999).

separate political and diplomatic trajectories as complex sets of rules of practice. That downplaying is performed in favor of a higher order of commonality that is found in technique, function, purpose, and values. In that inverted picture of fragmentation, we witness agreement and convergence between “laws of war” and the “rights of humans,” based on the same bases as the general process of fragmentation: the two bodies of rules are part of a greater formal system, and they have their own idiosyncratic constraints, biases, and immediate functions. The diagnosis of fragmentation, as it was presented by the International Law Commission’s working group in charge of analyzing the issue, was the following:

The problem—as lawyers have seen it—is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices, and possibly the loss of an overall perspective on the law.⁶⁵

The response that was proposed by the ILC was to approach the process as essentially a complex technical problem. If the issue is defined as one of the emergence of specialized regimes resulting in contradictions, oversight, and general problems caused by poor coordination, those are the issues that are to be solved, not fragmentation *per se*, especially given the fact that people are divided on how bad fragmentation itself is.⁶⁶ And so this is the ILC’s method:

The fragmentation of the international legal system into technical “regimes,” when examined from the point of view of the law of treaties, is not too different from its traditional fragmentation into more or less autonomous territorial regimes called “national legal systems.” This is why it is useful to have regard to the wealth of techniques in the traditional law for dealing with tensions or conflicts between legal rules and principles.⁶⁷

In the case of human rights and humanitarian law—both in descriptive and normative terms—the issue is one of coping with defragmentation (is it happening? and should it happen at all?). Against the general picture of fragmentation, what makes defragmentation familiar is that it is also a process emptied of political content, in favor of technical management or—in our case—overriding ethical references, or both. Yet fragmentation appears as the objects of regulation differentiate, causing coordination problems. By implication, defragmentation—as a reverse of

65. Fragmentation of International Law, *supra* note 2, ¶ 8.

66. *Id.* ¶ 9.

67. *Id.* ¶¶ 17–18.

fragmentation—implies de-specialization and therefore merger not so much of norms (since they are always seen as different) as of objects. The respective objects of the law of the sea and the law of indigenous rights are distinct in a way that the objects of humanitarian law and human rights are not. That this appears against a background where the nuances of State violence as a political phenomenon disappear in favor of humanity and common humanisms is the basis for defragmentation, regardless of the practical realities of the meeting between human rights and humanitarian law.

At this point I suggest that we recover the deep political content of human rights, and by the same token seek the deep political content of humanitarian law. The general backdrop for a recovery of the political in the conversation on human rights and humanitarian law is the following. Each body of rules has its autonomous structure, regardless of those elements that are interpreted to constitute objective overlaps between them. The organization of each body of rules, when we imagine them from the outside, shows a direction or structural bias.⁶⁸ Each body of rules frames reality in a specific and partial way, as determined by its inner logic and purposes, which may not be fully coherent or systematic but are sufficiently so to provide an identity to the body of rules. From there the distinction between human rights and humanitarian law is related to the bias in each regime. What I suggest is that human rights law's bias is expressed by the organization of human rights norms around the fundamental principle of "non-discrimination." Humanitarian law in turn is organized around the principle of "distinction." The meaning of those fundamental principles is essentially political, in the specific sense of being rooted in a political worldview. That worldview structures each body of norms by defining its object and organizes the relationship that they have between them by projecting the relationship that those respective objects have with one another. That worldview, with all its inner tensions, thereby structures the whole normative space within which human rights and humanitarian law will meet. That normative space is international law.

In more specific legal terms, the argument is that the distinction between human rights and humanitarian law is intimately linked to the "principle of distinction" within humanitarian law. By the same token, the idea of non-discrimination in human rights is linked to the idea of a separation between humanitarian law and human rights, in so far as humanitarian law's object is wartime relations, and human rights' idea of war is connected to the core object of human rights law, *i.e.* the legitimacy of the State's exercise of coercive power. The relationship between human rights and humanitarian law is organized around their respective takes on State violence, and their separation reflects a political conception of legitimacy. The un-political

68. Koskenniemi, *supra* note 8, at 12.

reading of those bodies of law is therefore not un-political. It contributes to hiding from political view the deeper reason for the differences and shields technocratically what should otherwise be the object of political debate—that is, the shift from one normative universe to another one.

A. Humanitarian Law: The Principle of Distinction

The modern formulation of the principle of distinction—in Articles 48⁶⁹ and 51⁷⁰ of the 1977 Additional Protocol I to the 1949 Geneva

69. “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” API, *supra* note 24, at art. 48.

70. Article 51 reads as follows:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
 - (a) Those which are not directed at a specific military objective;
 - (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
5. Among others, the following types of attacks are to be considered as indiscriminate:
 - (a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
 - (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

Conventions—comes to us from a line of codification endeavors expressing in different ways the general notion that, in war, combatants and non-combatants should be distinguished at all times.⁷¹ The importance of that principle is now fixed in the idea that it constitutes a “cardinal” rule of international humanitarian law.⁷² Distinction is a principle, that is, a normative foundation of a general character developed into a variety of more specific rules. One formulation of the rule’s high normative status puts it as follows: “[c]ompliance with this concept of distinction is the fundamental difference between heroic Soldier and murderer.”⁷³ As insightfully remarked by two military legal officers in this profound statement, the principle of distinction is more than simply fundamental—it is a fundamentally distinguishing principle. Distinction is framed as compliance with a concept, not a rule. That suggests immediately that the distinction (between noncombatant and combatant) branches out into other and more specific distinguishing rules, such as the distinction between the figure of the “Soldier” and the figure of the criminal. Compliance with the “conception” of distinction contributes to marking thereby also the limit between war and peace, considered as two fundamentally distinct perspectives on death and killing. The uncontroversial claim here is simply that the principle of distinction can be understood—not only

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

API, *supra* note 24, art. 51.

71. Whereas the 1907 Hague regulations do not as such refer to the idea of “distinction,” an early and quite peculiar formulation of the principle of distinction can be found in the Institut de droit international’s 1880 Oxford Manual, Article 7 of which declares that “[i]t is forbidden to maltreat inoffensive populations.” See THE LAWS OF WAR ON LAND (1880), reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 44, at 35, 38. Before Additional Protocol I, the General Assembly had proclaimed distinction a principle applicable to all situations of armed conflict in the following terms: “distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.” G.A. Res. 2444 (XXIII), U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc. A/7218 (Dec. 19, 1968).

72. *Nuclear Weapons Legality*, 1996 I.C.J. 226, ¶ 257.

73. Lt. Col. Mark D. Maxwell & Maj. Richard V. Meyer, *The Principle of Distinction: Probing the Limits of its Customariness*, 2007 ARMY LAW. 1.

philosophically but also legally—as the foundation of the whole system of international humanitarian law. To explain what that means, I turn to the best exposition of the policy considerations and goals that sustain the modern project of humanitarian law: the Preamble to the 1868 St. Petersburg Declaration.⁷⁴

If one accepts for the sake of argument that the Declaration can serve as a succinct exposition of the logic of humanitarian law through its particular take on the idea of distinction, two structural features of the principle emerge. First, the principle refers at a basic level to an issue of means in relation to an end. And, second, the principle of distinction is not mentioned by name or even in any apparent fashion in the Declaration. Yet, the twin cardinal principle of “prohibition of unnecessary suffering,”⁷⁵ as well as its associated—yet more controversially fundamental—principle of the “prohibition of means rendering death inevitable,”⁷⁶—both of which explicitly mentioned in the Declaration (§ 5)—should be understood as corollaries of the principle of distinction. The prohibition of unnecessary suffering is presented in the logic of the Preamble as a normative implication of the Declaration’s statement on the legitimate ends of war, which in turn refers implicitly to the idea of distinction (§ 3). In other words, the prohibition of unnecessary suffering should be understood as a reformulation of the obligation to distinguish between combatants and non-

74. St. Petersburg Declaration, *supra* note 21, at 159.

[¶1] On the proposition of the Imperial Cabinet of Russia, an International Military Commission having assembled at St. Petersburg in order to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations, and that Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, the Undersigned are authorized by the orders of their Governments to declare as follows:

Considering:

[¶2] That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

[¶3] That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

[¶4] That for this purpose it is sufficient to disable the greatest possible number of men;

[¶5] That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

[¶6] That the employment of such arms would, therefore, be contrary to the laws of humanity . . .

Id.

75. *Nuclear Weapons Legality*, 1996 I.C.J. 226, ¶ 78.

76. See the inspiring discussion in DAVID, *supra* note 44, at 307.

combatants. Instead of discriminating among individuals, the obligation here is that of discriminating between the combatant and the non-combatant in the same physical person: legitimate violence will be that which is necessary to put the physical individual *hors de combat* (§§ 4–5) or—in other words—necessary to kill the (present) combatant without killing the (past / future) non-combatant in the physical individual. This imagery is where the recovery of the political frame of humanitarian law begins.

1. Rousseau Distinguishes War

This edifice of humanitarian law finds its axiomatic base in a vision of war that sets discursively the St. Petersburg Declaration in the broad political universe of social-contract theories of the State. Rooting the principle of distinction in the social contract is how we come to a clearer association of humanitarian law with a political discourse on legitimate violence. I use one specific episode of the social contract tradition for the purpose of expounding the political roots of the principle of distinction, and that is the disagreement between Jacques Rousseau and Thomas Hobbes on the nature of war.⁷⁷ In it the question of war takes on a fundamental role in the understanding of the legitimacy of the State, because of its cardinal place in explaining the transition to the political state from the state of nature.⁷⁸ The precise moment to be highlighted here happens when Rousseau—agreeing with Hobbes that “war” is a state, rather than an event—interjects that for it to be a state it has to be by necessity a public phenomenon. The use of violence among individuals *qua* individuals, as opposed to agents of the sovereign, is not war, and that is so for several reasons, which will contribute to produce a particular, but very familiar, picture of the nature of war.

77. The purpose here is not a historical reconstruction of the association between “war” and international law, but rather a more substantial depiction of what is at stake in the peculiar vision of war presented in the St. Petersburg Declaration. An attempt at doing the former can be found in the important STEPHEN NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* (2007). In that context, Neff quite helpfully talks of Rousseau, although in passing (yielding a legally justified first role to Grotius), as defending a “nationalization” of war. See *id.* at 101.

78. The following can only be a shocking simplification of a complex and much commented debate at the origins of modern political liberalism. The importance of a reference to Hobbes and Rousseau here lies in the fact that their (ambiguous) disagreement on foundational notions within the social-contract tradition have an impact on the understanding of “war” and its connection to ideas of sovereignty and citizenship, which are important to international law, notably because of international human rights law. Given the particular political projects defended by Rousseau, a good starting point is his disagreement with Hobbes concerning the deep psychological nature of the human being that comes in Rousseau’s extended presentation of his view on the state of nature. See his *Discours sur l’origine, et les fondements de l’inégalité parmi les hommes* [1755] [hereinafter Rousseau, *Discours*], in JEAN-JACQUES ROUSSEAU, *ŒUVRES COMPLETES III* (Bernard Gangnebin & Marcel Raymond eds., 1964) 131–223.

Hobbes, at least as Rousseau reads him, describes the state of nature as a state of war.⁷⁹ For Rousseau however, relations among human beings living in their “primitive independence,” as he puts it, do not enjoy the kind of permanence that a “state” requires.⁸⁰ Contrary to Hobbes, who sees human beings as naturally adventurous and prone towards conquest, Rousseau says that one should consider human beings as naturally fearful.⁸¹ This leads Rousseau to say that human beings are naturally not enemies of one another⁸² (as opposed to Hobbes’ often quoted “*homo homini lupus*”⁸³ and “solitary, poor, nasty, brutish, and short” formulas).⁸⁴ Besides, as a state or condition, war is a relationship to and between things, not between individuals⁸⁵—in the sense that war is about controlling, moving, stealing, and destroying things, as opposed to an exchange between individuals *qua* monads or billiard balls. As a result, as far as individual human beings are concerned, war is always “accidental.” War is neither universal nor permanent, nor general, both because of human beings’ psychological make-up and because of the nature of war as an activity involving essentially property. In other words, it is only tangential to their existence as pre-social “human beings” because of the very idea of “war” understood as a social condition or set of social relations.⁸⁶

In positive terms, Rousseau’s republican position is expressed therefore also in his own conception of war, which is the exact opposite of Hobbes’ indistinct war as the natural state of individuals. War needs political society to exist on both psychological and conceptual grounds. Psychologically, the constitution of political society through the social contract permits the growth of feelings that will offset man’s natural fear, such as honor, prejudice, or vengeance.⁸⁷ Those will make war as war possible. Conceptually, and more importantly, the constitution of political society gives rise to the possibility of a “state” of war, a set of permanent, or at least continuous, relations among things, based on the fact that property relations

79. THOMAS HOBBS, *LEVIATHAN* 88 (Richard Tuck ed., 1996) (1651) (in which Hobbes famously describes the state of nature as a permanent state of fear and risk, and describes such state as a “condition” akin to a type of weather.).

80. Jean Jacques Rousseau, *Du contrat social, ou Principes du droit politique* [1762], [hereinafter *Contrat social*], in *ŒUVRES COMPLETES III*, *supra* note 78, at 357.

81. Rousseau, *Discours*, *supra* note 78, at 136.

82. Rousseau, *Contrat social*, *supra* note 80, at 357.

83. THOMAS HOBBS, *ON THE CITIZEN 3* (Richard Tuck and Michael Silverthorne eds., Cambridge University Press 1998) (1642).

84. HOBBS, *LEVIATHAN*, *supra* note 79, at 89.

85. Rousseau, *Contrat social*, *supra* note 80, at 357 (“*C’est le rapport des choses et non des hommes qui constitue la guerre, et l’état de guerre ne pouvant naître des simples relations personnelles, mais seulement des relations réelles, la guerre privée ou d’homme à homme ne peut exister.*”)

86. Jean-Jacques Rousseau, *Que l’état de guerre naît de l’état social*, in *ŒUVRES COMPLETES III*, *supra* note 78, at 602.

87. *Id.* at 601

are given stability and durability by law.⁸⁸ In simple terms, if war is to be a “state,” it needs States.

For Rousseau, war is still not possible among individuals after the transition to the political state, because—under the sovereign—individuals have renounced the power to dispose of their own life and that of their partners in the social contract.⁸⁹ More dramatically—and this is where the full import of the discussion with Hobbes shows itself—Rousseau suggests that the (hypothetical) first constitution of a civil society triggers the formation of others, until the “whole face of the Earth” has changed, in the sense of there being no human beings left.⁹⁰ That is, the natural freedom and independence of the primordial human being has disappeared in the constitution of societies, which have replaced human beings with citizens. Those societies have inherited the total independence of pre-social human beings, with the crucial difference that they—unlike humans—are artificial beings with no naturally determined limits to their size or strength, and—by necessity—a very strong suspicion towards neighboring societies, who are equally situated.⁹¹ A permanent state is created. Within that state, “war” may be the essence of the relations among jealous States, but it will always be—by necessity—an accident for human beings within them, in the sense that they will just happen to be affected sometimes by war, which is always and only a relation among States.⁹² War is the very result of the formation of political societies, as opposed to being their cause or origin.

From the inter-state perspective, Hobbes and Rousseau may be seen to converge.⁹³ That limited convergence is however based on different notions of what “war” is, and—very importantly—against the backdrop of a fundamental disagreement on whether the state of nature is a state of “war.” From that disagreement as to what war is, Rousseau goes on to draw the consequences for his own idea of “war” as an intimate political, socially

88. Rousseau, *Contrat social*, *supra* note 80, at 357.

89. Rousseau, *Que l'état de guerre naît de l'état social*, *supra* note 86, at 602.

90. *Id.* at 603.

91. *Id.* at 604–05.

92. Rousseau, *Contrat social*, *supra* note 80, at 357.

93. According to Hobbes' famous description:

[T]hough there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings, and Persons of Sovereigne authority, because of their Independency, are in continuall jealousies, and in a state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours, which is a posture of War.

constructed, and socially contracted event. As he says, human beings decide to attack one another only after they have (been) socialized, and they become soldiers only after becoming citizens.⁹⁴ Being a soldier is possible only based on citizenship, that is, membership in a socially contracted polity. Therefore in war, human beings meet on the battlefield only accidentally. The “accident” is constituted by the meeting of soldiers, who on the battlefield are not citizens (“members of the homeland”) but, precisely, soldiers (defenders of the homeland).⁹⁵ As a result of this, the killing of human beings is itself an “accident” of war; it is not the objective, but it can happen as a result of the activity that is otherwise carried out in the pursuit of the actual objective in war. As described by Rousseau, the end of war is the destruction of the enemy State, so that it is legitimate to destroy its defenders while they are fighting. As soon as they cease to be the “instruments” of the State, for instance if they lay down their weapon, they become human beings again, and the enemy power loses its right over their life.⁹⁶ As such the State is not supposed to hurt human beings, but rather soldiers, with the knowledge that the soldiers were once—and can become again—mere human beings. The consequence is that since the State acts through its “instruments” against the enemy’s own instruments, human beings very rarely meet one another on the battlefield, and as such they have no animosity against one another despite the ongoing violence.⁹⁷

In other words, the right to legitimate killing is attached to the notion of the human being carrying out the function of soldiering, *i.e.* the idea that the human being is enveloped in that function in a way that makes him an instrument of the State. In the most striking way, Rousseau suggests on that basis that it is possible to “kill the State and not kill a single one of its members.”⁹⁸ That is the ultimate consequence of the notion that war, as Rousseau expresses it, does not give any more rights than are necessary to its ends. It is possible to kill the instruments of the State while not killing the human beings who carry out the function of instruments of the State’s will.⁹⁹ All that is necessary is to put the “instruments” out of function, which is done by converting as many fighters into human beings again. In the lingo of the laws of war, one would talk of putting soldiers out of combat, *hors de combat*. That again, is based on the notion that in the business of war the only enemies are public authorities for whom human beings are fighting: citizens of different societies are not one another’s enemies, and

94. Jean-Jacques Rousseau, *Que l'état de guerre naît de l'état social*, *supra* note 86, at 601.

95. Rousseau, *Contrat social*, *supra* note 80, at 357.

96. *Id.*

97. According to the now famous formula: “*les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats.*” *Id.*

98. *Id.* at 357–58.

99. *Id.* at 357.

the enemies faced by the State are other States, not the individuals that just happen to carry out the will of those enemies (or, as Rousseau puts it, there can be no such type of relationship between entities of different kinds, such as an individual and a State.)¹⁰⁰ The foreigner who just kills and destroys without declaring war in those terms—be it a king or a people or an individual—is not an “enemy,” but rather a bandit.¹⁰¹

When one says, therefore, that the objective in war is the destruction of the enemy State, that means that the target is the abstraction constituted by the social contract; if one could break the social contract in one strike, the State would *eo ipso* disappear and the war would be over, yet no life would have been lost.¹⁰² The killing of human beings in war is a means and not the end,¹⁰³ so that the killing of human beings is a means to the hurting of the State, given that they embody its instruments. But again, it is one means, and not a necessary means to that particular end, since human death is always to be seen as an accident. As Rousseau sees it, in ways that will be technically amplified by the contemporary laws of war, the ill-treatment or enslavement of human beings condoned by classic writers of the law of nations, including the ill-treatment of prisoners of war, is from that perspective rightly looked upon with indignation.¹⁰⁴

One can understand the powerful summary that Rousseau makes of his disagreement with the “horrible system” proposed by Hobbes of a war of all against all—a system that constituted visibly the chief motivation for Rousseau to expand specifically on the issue of war. Rousseau simply says: war is born of peace (“*la guerre est née de la paix*”).¹⁰⁵ The elimination of the possibility of (hypothetical) “particular wars” in the state of nature (*i.e.* the state of war described by Hobbes) through the creation of social contracts is the cause of (actual) “general wars” (wars between societies, that is, “general wills”), which are, says Rousseau, much more terrible.¹⁰⁶

Both understandings of “war”—Hobbes’ and Rousseau’s—are significantly attached to the liberal tradition, and both are important to the idea of the State as the sole source of legitimate violence. A schematic notion of the difference as it will play out here, would depict Rousseau’s “war” as legal and politically constructed (war exists because of the State), whereas Hobbes’ “war” would be seen as the sociological backdrop to the

100. *Id.*

101. *Id.*

102. Jean-Jacques Rousseau, *Que l'état de guerre naît de l'état social*, *supra* note 86, at 608.

103. Jean-Jacques Rousseau, *Fragments sur la guerre*, in *ŒUVRES COMPLETES III*, *supra* note 78, at 613.

104. *Id.* at 614–15.

105. Jean-Jacques Rousseau, *Que l'état de guerre naît de l'état social*, *supra* note 86, at 610.

106. Jean-Jacques Rousseau, *Extrait du projet de paix perpétuelle de l'Abbé de Saint Pierre*, in *ŒUVRES COMPLETES III*, *supra* note 78, at 564.

existence of the State (the State exists because of war). From there, the St. Petersburg Declaration can be read against Rousseau's position, especially in association with Rousseau's extensively discussed understanding of human nature, and the relationship of citizen to human being.¹⁰⁷ Here it takes the form of the known proposition that war does not exist between individuals but between societies or—in practice—between armed forces as instrumentalities of the State apparatus. The notion that in war there is no personal animosity between soldiers who face one another on the battlefield¹⁰⁸ is therefore not the product of humanitarian afterthoughts, although it may certainly find added support in them. It is a direct product of the mechanism of State legitimacy, which—under a different outlook—supports also the monopoly of the “legitimate use of physical force” by the sovereign within its territory.¹⁰⁹

2. *Privileged and Unprivileged Agents of War*

A legal translation of the foregoing is that war is waged by agents or “organs” of the State, resulting thus in “the privilege of the combatant” or “combatant immunity.”¹¹⁰ The privilege in question refers to the very idea of “war” developed above with the help of Rousseau (if one follows the notion that Rousseau's and humanitarian law's conceptions of war are related). The combatant is not engaged in a private enterprise but is fighting on behalf of a society represented by a State.¹¹¹ As such, the regular actions

107. For a different take on the linkage between Rousseau's general outline of the social contract and his take on the idea of “war,” see Allan Rosas, *J.J. Rousseau and the Law of Armed Force*, in *LAW AT WAR: THE LAW AS IT WAS AND THE LAW AS IT SHOULD BE. LIBER AMICORUM OVE BRING* 219–30 (2008).

108. The received intellectual lineage between St-Petersburg and Rousseau would come from this passage from Rousseau, *Contrat Social*, *supra* note 80, at 156–57.

109. MAX WEBER, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 78 (H. H. Gerth & C. Wright Mills trans., 1958) (expressing the notion that the state claims monopoly over the use of force).

110. A useful contemporary discussion of the privilege of the combatant can be found in Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 *PHIL. & PUB. AFF.* 148 (2005). A critical reading of the very idea is proposed in Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 *COLUM. J. TRANSNAT'L L.* 1 (2004–05).

111. In line with what Rousseau was cited above as saying about the difference between soldiers and bandits, the celebrated decision of the international military tribunal in the *Einsatzgruppen* case explained the difference between members of the Resistance and private individuals engaged in violence against Nazi occupation in these terms:

Many of the defendants admitting that they had conducted executions, explained that they had not killed any innocent persons but had merely shot partisans, to be sure, not in combat, but punitively. This bald statement in itself does not suffice to exonerate one from a charge of unlawful killings. Article I of the Hague Regulations provides:

of the soldier are privileged, in the sense that it is the combatant's exclusive "privilege" to be entitled to kill and destroy as a matter of principle, simply because the combatant is acting precisely not in its quality as a human being, but rather in representation of the sovereign. As such, just like as the official agents of the State, as organs of the State, are not to be punished personally for actions that they have performed under orders of their State (even and especially with a portion of its legitimate means of coercion),¹¹² so are the soldiers covered by an immunity from reproach and prosecution for the actions that they have carried out in regular fashion as the pawns of the State.¹¹³ The killing and the destruction are done by the State, which

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates.
2. To have a fixed distinctive emblem recognizable at a distance.
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

It is unnecessary to point out that, under these provisions, an armed civilian found in a treetop sniping at uniformed soldiers is not such a lawful combatant and can be punished even with the death penalty if he is proved guilty of the offense. But this is far different from saying that resistance fighters in the war against an invading army, if they fully comply with the conditions just mentioned, can be put outside the law by the adversary. As the Hague Regulations state expressly, if they fulfill the four conditions, "the laws, rights, and duties of war" apply to them in the same manner as they apply to regular armies. Many of the defendants seem to assume that by merely characterizing a person a partisan, he may be shot out of hand. But it is not so simple as that. If the partisans are organized and are engaged in what international law regards as legitimate warfare for the defense of their own country, they are entitled to be protected as combatants.

See *The Einsatzgruppen case*, *supra* note †, at 491–92.

112. This is the root of the whole *Rainbow Warrior* affair between France and New Zealand. See, e.g., Michael Pugh, *Legal Aspects of the Rainbow Warrior Affair*, 36 INT'L & COMP. L.Q. 655 (1987).

113. As none other than Telford Taylor put it, in the best possible fashion:

War consists largely of acts that would be criminal if performed in time of peace . . . Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors. But the area of immunity is not unlimited, and its boundaries are marked by the laws of war.

leads to the conclusion that the individual is not liable for those violent acts—only the State is.¹¹⁴ This derives simply and again from the notion that war—the activity in which the combatant is engaged—occurs between “public persons,” as Rousseau put it.¹¹⁵ Private war is in this sense a contradiction, expressed legally in the form of minimal tolerance for the private use of violence in the midst of war. A clear expression of that rejection of private violence in war is found in the “Lieber Code”—the set of legal instructions prepared by Francis Lieber for the Union Army in 1863. The Code uses the term “public enemies” to distinguish members of the hostile army from those who—engaging in hostilities illegitimately—should according to Lieber’s rules be treated as “highway robbers” and “pirates.”¹¹⁶ That mirrors the situation of the ones that Rousseau himself called “bandits.”¹¹⁷

The “nationalization” of war, common to Rousseau and the St. Petersburg Declaration’s foundations for contemporary humanitarian law, allows here to determine that the identity of war as a distinct activity revolves around the identity of those who perform it (rather than what the activity is). Delimiting the activity requires imagining therefore those who are not regular agents of war. The principal irregularity would be constituted by an association of war with private individual interest. Such privatization of war is what has prompted the notion that the term “unlawful combatant” be reserved to mercenaries, which is how Additional Protocol I

TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 19 (1970).

114. In technical terms, this is the link between Articles 43 and 44 API, the first one dealing with the definition of the regular armed forces, which constitute the core of the category of combatants, and the second one with the relationship between the status of combatant and the status of prisoner of war. The status and treatment of prisoners of war follows the idea of combatant privilege, in the sense that despite the fact that POWs may have been caught after killing and destroying, they are not detained as a form of punishment, but only as a means to keep them away from active hostilities. A good opportunity for clarification of those points arose precisely with the amendments to the definition of “combatants” by Additional Protocol I in 1977, which aimed at conferring POW status to captured members of national liberation movements, among other things. See generally W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 Concerning International Conflicts*, 42 *LAW & CONTEMP. PROBS.* 4 (1978) [hereinafter Mallison].

115. Rousseau, *Que l’état de guerre naît de l’état social*, *supra* note 86, at 607–08.

116. See Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100 (1863), art. 82, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 44, at 3, 14 [hereinafter Lieber Code]. Despite its formally domestic ambitions, it is regarded as one of the first contemporary codifications of the laws of war, given especially its influence on other codification attempts, such as the already cited Oxford Manual adopted by the Institute of International Law in 1880. See GREEN, *supra* note 20, at 279 (discussing the significance of the Lieber Code in the development of international humanitarian law).

117. See Rousseau, *Contrat social*, *supra* note 80.

seems to consider them.¹¹⁸ If one leaves aside more contemporary debates on unlawful participation in combat, particularly in the context of the “War on Terror,”¹¹⁹ the delimitation of “war” through a clear identification of its regular agents leads to the distinction between “unlawful” participation in hostilities and “unprivileged” participation in hostilities. The latter would be, in contrast to that of mercenaries, the situation of spies¹²⁰ under both the Hague Regulations and Additional Protocol I.¹²¹ The presence of the unlawful participant on the battlefield is by definition refused. The presence of the unprivileged combatant is acknowledged and tolerated to a certain extent, given that it is precisely not branded as unlawful. The distinction is crucial for understanding how the idiosyncrasies of humanitarian law relate to the fundamental worldview expounded above.

The clandestine character of the spy’s activity clashes with the openness and visibility that characterizes the figure of the combatant—which derives itself from the fact that war is “public.” As a result, the activity of spying itself is covered by immunity only to the extent that it is carried out openly, just like the activity of other combatants. Under contemporary treaty law, therefore, a spy who is caught in the middle of spying while not in their soldier’s uniform can possibly be executed for the very fact of spying,¹²² because of the secrecy of what is otherwise a legitimate activity if not carried “under false pretenses”, as the law puts it.¹²³ The complicated

118. API, *supra* note 24, art. 47.

119. U.S. DEP’T OF DEF., MEMORANDUM FROM THE DEPUTY SEC’Y OF DEF. TO THE SEC’Y OF THE NAVY REGARDING THE ORDER ESTABLISHING COMBATANT STATUS REVIEW TRIBUNAL (2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (defining the term “enemy combatant” in context). For a summary and interesting discussion of the American debate on this point, see Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT’L L. J. 1 (2007). See also the position of the ICRC on the topic in Knut Dörmann, *The Legal Situation of Unlawful/unprivileged Combatants*, 85 INT’L REV. RED CROSS 45 (2003).

120. Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to the Hague Convention on the Laws and Customs of War on Land arts. 29, 31, Oct. 18, 1907 [hereinafter HCIV], reprinted in RULES OF INTERNATIONAL HUMANITARIAN LAW AND OTHER RULES RELATING TO THE CONDUCT OF HOSTILITIES, *supra* note 21; API, *supra* note 24, art. 46. See also Lieber Code, *supra* note 116, arts. 88, 104.

121. On the question of illegitimate participation, see Mallison, *supra* note 114 (providing a very helpful analysis of API). On spies, see also THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 321 (Dieter Fleck & Michael Bothe eds., 1999).

122. Mallison, *supra* note 114, at 26–27.

123. Again, the Lieber Code expresses it best. In Section V, covering “Safe-conduct, Spies, War—traitors, Captured Messengers, Abuse of the Flag of Truce” one can find the recurrent threat of capital punishment for a series of activities such as those mentioned in the Section heading. As for the spy, the Code says that: “[t]he spy is punishable with death by hanging by the neck, whether or not he succeeds in obtaining the information or in conveying it to the enemy.” Lieber Code, *supra* note 116, art. 88. The reason for both the hostility against spies and the grouping of spies with traitors is made explicit towards the end of the Section, where we find an otherwise curiously inoperative provision: “[w]hile deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable

situation of the spy reveals that the public / political nature of war carries with it an element of openness and publicity that allows for the (easy) discrimination between legitimate and illegitimate hostility. Spying requires secrecy, and therefore, as made clearer in Additional Protocol I, not wearing one's uniform. However, that precisely makes it illegitimate, in that it implies a serious difficulty for the spied-on power in recognizing what kind of activity it is. Spies are therefore engaged in a treacherous activity, as the Lieber Code puts it, "because they are so dangerous, and it is difficult to guard against them."¹²⁴ In all other cases, being a combatant is a privilege and carries immunity from moral and legal reproach insofar as it remains within the rules by which international humanitarian law and international criminal law make war a regulated social activity of a public character. To confirm this, the universal rule is—not so curiously—that although spies can be executed for spying if caught in the act, they cannot be punished for past spying if they were not caught then.¹²⁵ Although past spying activity constituted at the time a treacherous act (the gravity of which would depend on the kind of "false pretenses" used),¹²⁶ it went unnoticed, and will be deemed *ex post facto* an act of the enemy State for which the individual is not responsible. From the perspective of the law, however, if caught in the act, the spy is individually in a very serious breach of the principle of distinction.

The specific example of the successful spy serves to bring forward the more general situation of the prisoner of war, and lead us thereby to the key figure in the legal operationalization of the principle of distinction. As such, a prisoner of war who tries to escape from a POW camp can be forcefully prevented from doing so, and can be legitimately killed in the process. However, if the escape is successful, but then the escapee happens to be captured at a later point in time, the initial escape cannot be legitimately punished.¹²⁷ That is so because it is understood that it is the soldier's duty as a soldier to try and escape from the enemy's hands.¹²⁸ This reminds us that being a prisoner of war is not a punishment, given that soldiers cannot be punished for participating in combat. That is very concretely the meaning of

warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them." *Id.* at art. 101. In line with contemporary codifications, the most significant element in the act of spying is secrecy: "[a] spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy." *Id.* at art. 88.

124. *Id.* at art. 101.

125. *Id.* at art. 102.

126. Rome Statute, *supra* note 30, art. 8(2)(e)(ix).

127. GCIII, *supra* note 24, art. 91.

128. For the U.S. case, see for example, George S. Prugh, Jr., *The Code of Conduct for the Armed Forces*, 56 COLUM. L. REV. 678 (1956).

their privilege. Prisoners of war are therefore “detained,”¹²⁹ that is, they literally are “held back” from returning to combat, rather than imprisoned as a result of their position of hostility.¹³⁰ Prisoners of war are all “detainees” in so far as they are under the responsibility of a “Detaining Power,”¹³¹ *pace* Secretary Rumsfeld’s once compulsive use of the term “detainee” to avoid granting implicitly “War on Terror” captives any legal status.¹³² As such, the law insists that “[p]risoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them.”¹³³ The public character of war culminates in the famously alien sounding provisions concerning the release of prisoners of war on parole,¹³⁴ that is, on the promise of not going back to combat after release.¹³⁵ The Hague Regulations, in this case, unlike the Geneva Conventions, add that the soldier caught in violation of the terms of the parole falls out of the status of prisoner of war and can be tried for the use of violence itself.¹³⁶

129. The description of the situation of the POWs says that “they have fallen into the power of the enemy.” GCIII, *supra* note 24, art. 4.

130. As a result, and except when dictated by necessity, prisoners of war cannot be detained in penitentiary establishments. *See* GCIII, *supra* note 24, art. 22.

131. That is the term used throughout the Geneva Convention Relative to the Treatment of Prisoners of War, starting with the framing provision of Article 13:

Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.

GCIII, *supra* note 24, art. 13.

132. In that context, “detainees” are the individuals who are detained on the basis of the Military Order of November 13, 2001, that is, individuals later referred as “unlawful combatants” or, more confusingly “enemy combatants”. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001). *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001).

133. GCIII, *supra* note 24, art. 12.

134. GCIII, *supra* note 24, art. 21. *See also* 3 JEAN PICTET, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 178 (1958).

135. *See* Maj. Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200 (1998).

136. HCIV, *supra* note 120, art. 12. Given that the possibility of parole is entirely based on the law of the prisoners’ own State, if upon their return they are told to go back to the front coercion will be a mitigating circumstance. *See also* 3 JEAN PICTET, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 178 (1958).

3. From Privileged Agents to Legitimate Means of Warfare

From general ideas of legitimate violence based on publicness and publicity attached to the agents and targets of war (the “armed forces”), the St. Petersburg Declaration derives the notion that the aim of war not only results in a delimitation of the nature of participants, but also imposes a delimitation of the nature of the activity itself. That is the immediate object of the Declaration, which constitutes a quintessential “Hague Law” instrument, for which the Preamble gives us the most philosophical of rationales.

Against the social contract background, private violence is most likely a crime. But public violence is not as such necessarily legitimate war, insofar as to be legitimate an act of war must be specifically aimed at weakening the military forces of the enemy.¹³⁷ Rousseau had anticipated the Declaration’s formulation, according to which the objective could be attained by disabling the greatest possible number of men.¹³⁸ Any means used in the course of war that exceed that objective are not legitimate, that is, not legitimated by the aims of war.¹³⁹ By the terms of the introductory paragraph to the Preamble, which states that the mission of the military commission that drafted the declaration was to fix “the technical limits at which the necessities of war ought to yield to the requirements of humanity,” the use of means that exceed the goal of disabling men, would then break the limits of military necessity and infringe on the requirements of humanity. Such means—or their use—are therefore considered to be in breach of the “laws of humanity.”¹⁴⁰

The foregoing happens—by definition—in the case of means of combat that produce “superfluous injuries,” “unnecessary suffering,” or “inevitable death.”¹⁴¹ Analytically, an “excessive” act violates the agreed upon common framework of understanding on the nature of the activity in which different States are involved. That activity here is “war.” As a breach it is *ipso facto* not an act pertaining to that activity as defined by the law. The act is something else than war: just like private acts of war were once termed acts of banditry, here excessive public acts of war will also lose their warlike quality and potentially become crimes, that is, unlawful acts of (private) individuals.

In the case of the St. Petersburg Declaration, that much is manifested in the staging of the text as the expression of the “technical limits” between

137. The Declaration, at its second preambular paragraph, declares quite famously “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.” St. Petersburg Declaration, *supra* note 21, at 159.

138. *Id.* ¶ 3.

139. *Id.* ¶ 4.

140. *Id.* ¶ 5.

141. *Id.* ¶ 4.

military necessity and humanity that have been fixed “by common agreement.”¹⁴² The breach of the common agreement in the case of “war” will always boil down to a breach of the foundational principle of distinction, a failure to differentiate between civilians and combatants, or between the combatant and the human being that hides behind the uniform of the combatant.¹⁴³ Means of combat that fail to do either one of those violate by definition the idea of distinction, and are therefore in contradiction with the “laws of humanity,” which otherwise, according to the Declaration, contribute to making war a distinct activity. From that liberal perspective, deliberate attacks against civilians,¹⁴⁴ attacks of an indiscriminate nature¹⁴⁵ or with indiscriminate means,¹⁴⁶ and attacks against legitimate military objectives with means that will prolong suffering beyond war¹⁴⁷ all constitute in the end the same violation. International criminal law will implement that idea by categorizing particularly egregiously excesses of that type as crimes. As in the case of the spy or the paroled prisoner of war, breach of the law makes the private individual reappear; that individual is considered then the immediate author of the act, as opposed to the State itself.

4. *Distinction and the Construction of War by International Law*

This construction of war as depending on the functional splitting of human beings is important on several fundamental counts. First, it supports the idea that “war” is a legitimate activity and as such finds grounds for legitimacy beyond the rules of the game constituted by the “laws of war.” In

142. *Id.* ¶ 1.

143. The idea of “excess” as the characteristic of a violation of the laws of war is common to violations of the principle of distinction *stricto sensu* and violations of the prohibition of unnecessary suffering. The first case is exemplified by military operations causing “excessive” civilian casualties and damage with relation to what is “necessary” to accomplish the objectives of any war operation. *See generally* API, *supra* note 24, art. 51(5)(b), art. 57, ¶ 2(a)(iii), and a specific instance of it in relation to the protection of cultural property in Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, art. 6, 2253 U.N.T.S. 212. The second is best exemplified by the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter Convention on Certain Conventional Weapons].

144. Rome Statute, *supra* note 30, art. 8(2)(b).

145. API, *supra* note 24, art. 51(4)(a).

146. *Id.* at art. 51(4)(b), 51(4)(c).

147. The idea that the effects of war must disappear when war ends is intimately connected to the notion of “war” that is contemplated by humanitarian law. This is evident in the way in which the protection of the environment is framed, see for example, API, *supra* note 24, art. 35(3), or in the justifications presented for the banning of certain means of combat that continue causing harm after the end of hostilities. *See* Convention on Cluster Munitions, *supra* note 29, pmb1.

that sense, the “laws of war” never discuss the legitimacy of “war” as an existing context, but rather police its boundaries, which results in the very possibility of a “correct” way of performing warlike activities.¹⁴⁸ Second, it is the basis for the idea that wartime killing and destruction are legitimate if directed at the “forces of the enemy,” which includes the possibility of legitimately ending the life of human beings, as an unfortunate accident (and sometimes a necessary byproduct) in the activity of war, rather than its objective (the objective in war being to render the enemy incapable of participating in war by taking its soldiers out of combat.) As a result, not only is war as such a legitimate activity, but also deliberate ending of life itself is acceptable. Third, both the unquestioned existence of war and the possibility of agreeing on its definition imply that there is a larger frame within which the agreement can be reached. Concretely, it means, on the one hand, that there is at least a theoretical possibility of agreeing that a given situation of war indeed exists, starting with the notion that the two or more enemies recognize one another as legitimate enemies (as opposed to “bandits.”) On the other hand, it means also that the two enemies will find it significant to come up with common rules of a legal nature, which will be assumed to be enforceable and enforced by all the parties to the activity of war.

That common frame of agreement today is the international legal system. The consequences of framing the laws of war in international law are in turn the following. (1) First comes the sovereign State, and the framework in which States interact as mutually recognized States, or in contemporary terms “equal sovereigns,” in which they are equal precisely by their exclusive sovereign function of using war, if need be, against one another on behalf of their respective communities. Outside international law, the idea of an encounter between two sovereigns is meaningless, since without a common law to coordinate sovereigns, starting with their mutual recognition as identical entities, sovereignty as a set of privileges against others is indistinguishable from greater brute force. (2) The principle of distinction is from there fundamentally implemented through the legal delimitation of the identity of the “State agent,” from where other identities are derived in one way or another, starting with the identity of the non-combatant by excellence, the civilian.¹⁴⁹ Soldiers, combatants, prisoners of

148. The idea is not new. See Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L. L.J. 49 (1994); DAVID KENNEDY, *OF WAR AND LAW* 125 (2006).

149. Everything in the system of the Geneva Convention starts with Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, which defines the persons entitled to the status (and persons entitled to the treatment) of prisoners of war. GCIII, *supra* note 24, art. 4. The definition of civilians protected by the Fourth Geneva Convention, which is given in its Article 4, defines civilians as those not covered by the three other Conventions. GCIV, *supra* note 24, at art. 4. The personal scope of application of the first two Conventions is identical to Article 4(A) of GCIII (with the exception of the persons

war, civilians and other inhabitants of the land of war are not natural occurrences, but rather constructions of the mind situated within common systems of meaning. In our case, such a system is designated implicitly by the St. Petersburg Declaration to be international law and the political theory that animates it. (3) Functional splitting and recombination is a permanent feature of war, given the presumption that behind the legal identity always lies a human being—just like behind the hospital identity marked by the Emblem lies a building, which can be very functionally hijacked. The existence of war is in all cases premised on the possibility of that splitting being accepted. (4) From that perspective, deliberate killing of human beings is in all (theoretical) cases illegitimate, given that it is a transgression of the deeper notion of “distinction,” that is, the distinction between human beings and their given functional identity. (5) Similarly, at the periphery of “war” activity, the soldier can be functionally split into human being and State agent for the purpose of criminal sanction (independently of the State’s own responsibility on other grounds). Rules are (theoretically) agreed upon for the purpose of circumscribing the possible circumstances of that splitting, which implies the development of rules external to humanitarian law, into which humanitarian law expels individuals who are split from their function. Any act that is codified as a crime is rooted in a breach of distinction, a breach the seriousness of which makes the incriminated act slide out of the world of war, and therefore puts the individual behind the uniform in the spotlight. The act is punished as a crime in the very same sense that domestic crimes are punished, that is, as grave acts that pose a danger to society as a whole, beyond their immediate victim.

The marginal case of war criminality entrenches the fact that the fabric of international humanitarian law is marked with the principle of distinction in the form of identity assignments, and in so doing constructs “war” as an implementation of the basic statements of the St. Petersburg Declaration. In concrete terms, “war” is something defined by humanitarian law itself and is not received from the sociological facts of the outside world. As a result, humanitarian law may not have the same understanding of “war” as other possible perspectives on the phenomenon of “war,” including other academic and professional disciplines. More specifically here, humanitarian law’s war can be different from the “war” imagined in other bodies of law, such as the *jus ad bellum* and international human rights law.

described in Part B of Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, who are not entitled to the status but only to the treatment of POWs). See GCI, *supra* note 24, art. 13; GCII, *supra* note 24, art. 14; GCIII, *supra* note 24, art. 4(A). When API describes the category of civilians in the context of the conduct of hostilities (and the protection of civilians against the effects of those hostilities), it essentially repeats (not to get into too much detail here) the maneuver of Article 4 GIV, by referring in the negative to Article 43 API (definition of the “armed forces” as those “who have the right to participate directly in hostilities”) and Article 4(A) GCIII. See API, *supra* note 24, art. 50.

5. Combatant Immunity as a Basis for all Rights and Obligations

The foundational move of the *jus in bello*—considered as the law that applies when war is a given—is the designation of the agent of the State through which the State operates and carries out the activity of war. The cornerstone of the whole legal edifice is therefore the set of rules regulating the assignment of the status of prisoner of war. Those rules articulate practically the recognition that violence performed by a given individual was in fact public violence.¹⁵⁰ The definition of those who are entitled to the status of prisoner of war is then the foundation for the residual definition of the category of civilians.¹⁵¹ This implementation of distinction is generalized as the central structural connection among the four Geneva Conventions through the articulation of the personal scope of application of each one of them, which in all cases depends on the definition of the prisoner of war.¹⁵² That is also true of the Additional Protocols, once the new definition of those entitled to the status of prisoner of war is integrated with the operation of all the Conventions.¹⁵³

The implementation of distinction through combatant immunity, implicit in the definition of the prisoner of war, gives retrospective coherence to the development of the Geneva Conventions themselves. The original and immediate purpose of what would become the system of the Geneva Conventions was to ensure protection for the medical personnel of the armed forces operating on the battlefield.¹⁵⁴ The protection of the permanent medical personnel of the armed forces,¹⁵⁵ and from there the medical

150. The Inter-American Commission puts it best:

The combatant's privilege in turn is in essence a license to kill or wound enemy combatants and destroy other enemy military objectives. A privileged combatant may also cause incidental civilian casualties. A lawful combatant possessing this privilege must be given prisoner of war status, as described below, upon capture and immunity from criminal prosecution under the domestic law of his captor for his hostile acts that do not violate the laws and customs of war.

Report on Terrorism and Human Rights, Inter-Am. Comm'n H. R., OEA/Ser.L/V/II.116/, doc. 5 rev, ¶¶ 68–70 (2002). In other words, “lawful combatant and prisoner of war status directly flow from the combatant's privilege.” *Id.*

151. PICTET, *supra* note 134, at 178.

152. Compare, as suggested *supra* note 149, GCIII, *supra* note 24, art. 4(A) and GCI, *supra* note 24, arts. 13–14.

153. API, *supra* note 24, at art. 44.

154. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 129 Consol. T.S. 361, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 44, at 279, 280–81.

155. GCI, *supra* note 24, art. 24; GCII, *supra* note 24, art. 36.

function¹⁵⁶ is a by-product of the created category of the *hors de combat*, since the latter need to be protected so that the aims of war are not overreached by their death through carelessness or negligence. This explains the fact that military medical personnel, the core of the medical function in war, are part of the armed forces and yet not entitled to the status of prisoner of war: they are “retained” if needed for the care of the *hors de combat*, prisoners or civilians, and not “detained” based on status, since the status would otherwise make them a legitimate target.¹⁵⁷ Protected medical personnel are as such the direct outgrowth of the principle of distinction: they signal that on the battlefield there is indeed a difference between human beings and their functional identity. Deliberate targeting of medical personnel is understandably considered a crime, that is, an act that is threatening to the legal system and not only harmful to its victim.¹⁵⁸ Similarly, perfidy, a mocking manipulation of the rules establishing that minimum of trust that allows for the system of legal protection based on distinction to function, is almost naturally singled out as a war crime when resulting in death or injury.¹⁵⁹

This exercise in connecting the normative dots against the large picture of distinction could be easily pursued with all categories of individuals—from journalists to spies to mercenaries to civil defense—with more or less illuminating conclusions. Here the importance of the case of medical personnel lies in the strong association of distinction with the didactically named “Geneva law,” that is, the body of rules dealing with “protected persons.” The very idea of “protection” comes from distinction, again understood as the functional splitting of human beings between human life and variously adopted social roles, starting presumably, as Rousseau saw it, with citizenship. The principle of distinction is however strongly associated also with “Hague Law,” or the law regulating the conduct of hostilities, the means and methods of weakening the enemy forces.

The principle of distinction signals simply that the enemy must differentiate between the human body and the public identity that it carries around. In the absence of such public identity, there is no enemy. In cases where the public identity is spotted, means should be used to kill it (the identity) without (necessarily) killing the human body that carries it, since that is not necessary to the overall war aim of weakening the State’s

156. API, *supra* note 24, arts. 12, 13, 16 (protection of medical units, civilian medical units, and medical duties).

157. GCI, *supra* note 24, art. 28; GCII, *supra* note 24, art. 37; GCIII, *supra* note 24, arts. 33, 35.

158. Rome Statute, *supra* note 30, arts. 8(2)(b)(xxiv), 8(2)(e)(ii). The ICRC compilation of customary international humanitarian law suggests that the criminalization of such deliberate acts is actually part of the body of unwritten law. See 1 JEAN MARIE & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 575 (1995).

159. API, *supra* note 24, art. 85(3)(f).

capacity resist submission to its enemy's will, as Clausewitz saw it.¹⁶⁰ The greater unity between Hague Law and Geneva Law does not come from the fact that Additional Protocol I or the Hague Regulations actually contain both types of rules. It comes from the fact that the torture of POWs, strategic aerial bombings, and the use of explosives generating non-detectable fragments all constitute the same infraction: transgressing the difference between agents of the public cause and human beings. When the affected target is a combatant, and not a civilian, we call that more specifically "unnecessary suffering," suffering beyond the threshold that puts the soldier *hors de combat*. As suggested above, this cardinal principle is therefore more than a twin to the principle of distinction; it is its legal offspring.

The merger of distinction and unnecessary suffering under the same logic of means / ends relationship confirms the image of war as a legally constructed tool. The law defines war by starting from its assigned goal, which then serves to constrain the activity, the means to pursue the objective of the game of war by precisely setting rules to the game of war. Humanitarian law, as organized around distinction, is a system that contributes to the definition of war as a meaningful activity. More precisely, it designates the objective *in* war, as opposed to the objective *of* war. Once one knows what war is and what it is to wage war, one can imagine how we will use it. War as an activity is itself a means towards an end, and from a legal perspective that end is a question for the *jus ad bellum* to settle. For instance, it can be a collective understanding of States that war is not an appropriate tool of foreign policy,¹⁶¹ or that war is to be eliminated by regulating the use of force by States against one another.¹⁶² Thus Clausewitz and international humanitarian law converge in the general proposition that war is a tool, with its logic and necessities, and it can be put to a variety of uses, which are determined by political considerations. These political considerations today have to be publicly expressed to the society of sovereign communities in the language of the *jus ad bellum*. This comes from the collective agreement contained in the Charter of the United Nations and again based on the premise of formal sovereign equality as

160. CARL VON CLAUSEWITZ, ON WAR 75 (Anatol Rapoport ed., 1982) (1832).

161. See Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 94 L.N.T.S. 57 (stating that the Kellogg Briand Pact signatories "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.").

162. Article 2(4) of the Charter of the United Nations is given a particular place in the political architecture of the Charter because the preamble of the Charter opens the statement of purpose with the words: "We the People of the United Nations, determined to save succeeding generations from the scourge of war . . ." which is followed in the second part of the preamble by two mentions of "peace" and one of "armed force" in the four lines describing the general means to the ends just described. See U.N. Charter, pmbl.

precisely unpacked in the seven articulations it finds in Article 2 of the Charter.

6. *Civil Wars and the Limits of Distinction*

However unwieldy the above generalizations may be, their abstraction can seem magnified by the recurrent notion that most “wars” nowadays are internal to States as opposed to among States.¹⁶³ There is a thesis out there concerning even the fact that wars are now of a new type, a type essentially defined as not being the one depicted in theoretical terms above.¹⁶⁴ Without entering that debate here,¹⁶⁵ a few words need to be said about civil wars as wars, in a way that would maintain the integrity of the political and legal articulation of war suggested above. Clarifying the idea of civil wars as “wars” will be a basis for a discussion of wars outside of the framework presented above, which is naturally the main humanitarian law concern about the “War on Terror.”¹⁶⁶ Here, however, the issue is that of understanding how distinction operates in civil wars. What I suggest is that civil wars are “wars” only because they are made to fit into the above worldview.

In cases of international wars the operation of the principle of distinction and the prohibition of unnecessary suffering depend on the legal construction (at both domestic and international levels of law-making) of the category of combatant,¹⁶⁷ which is attached to the figure of the sovereign State from which a combatant receives the privilege of legitimate destruction. As a result, in civil wars, the issue for law will be that the principle of distinction cannot operate, because as far as the State is concerned, the other warring party is constituted by the State’s own citizens. As a general consequence of this, the functional classification of human

163. *E.g.* HUMAN SECURITY REPORT 2004: WAR IN THE 21ST CENTURY (2004).

164. As an example of this new thesis, see MARY KALDOR, *NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA* (2nd ed. 2007); HERFRIED MÜNKLER, *THE NEW WARS* (Patrick Camiller, trans., 2005); PAUL GILBERT, *NEW TERROR, NEW WARS* (2003); Michael N. Schmitt, *21st Century Conflict: Can the Law Survive?*, 8 MELB. J. INT’L L. 443 (2007).

165. See Mats Berdal, *How ‘New’ Are the ‘New Wars’? Global Economic Change and the Study of Civil War*, 9 GLOBAL GOVERNANCE 477 (2003) (providing a starting point for analysis of the new type of war).

166. PRESIDENT OF THE U.S., *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 5 (2002); U.S. DEP’T OF DEF., *THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA* 2 (2005).

167. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 art. 4, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 7, 1950) (starting point for analysis of combatants as a category); API, *supra* note 24, arts. 43-44 (starting point for analysis of combatants as a category). See also the still very important HCIV, *supra* note 120, arts. 1-3.

beings is not operational in the same way as it is in international conflicts.¹⁶⁸ Rousseau's logic of public war clearly does not hold, or at least does not hold immediately as well as in a war among sovereign communities.

The principle of distinction in civil wars is therefore thwarted essentially by sovereignty, which very pragmatically constitutes an obstacle to the international regulation of civil wars.¹⁶⁹ In political terms, rejecting distinction in principle is tied to the notion that the State is the source of the law's political legitimacy at both domestic and international levels. From a jurisprudential perspective—and from the perspective of international law—a party rebelling against the State is illegitimate at least until it is victorious.¹⁷⁰ Out of the difficulty of having “combatants” in the functional sense outlined above, comes by implication the strange position of the notion of “civilian.”¹⁷¹ In black letter law, the “category” of civilians, although used (as in Additional Protocol II), is left undefined in a way that should not be surprising given that in international armed conflicts civilians are those who (to simplify just slightly) are not eligible for prisoner of war status if fallen in the hands of the enemy.¹⁷² We do have a mention of civilian populations, but the contours of that category are left undefined. The legal incongruity is a mere reflection of the notion that the principle of distinction cannot formally apply, because there are agents only on one side of the conflict; yet the principle of distinction has to apply somehow functionally, because distinction is the only reference that tells war apart from any other kind of violence, including law enforcement. The

168. Marco Sassòli, *Uses and Abuses of the Laws of War in the War Against Terrorism*, 22 LAW AND INEQ. 195, 196–97 (2004).

169. See GREEN, *supra* note 20, at 52 (“In accordance with the principle of absolute sovereignty over domestic affairs, such non-international conflicts were considered to be within the domestic jurisdiction of the State concerned”). Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law* 8 (Program on Humanitarian Policy and Conflict Research, Harvard Univ., Occasional Paper Series, No. 6, Winter 2006) (mentioning that concerns over sovereignty have resulted in the law of non-international armed conflicts being “more rudimentary”). For a detailed historical account of international law's tightening grasp on “non international armed conflicts” as against notions of “absolute sovereignty,” see generally ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* (2010). See in particular *id.* at 25–61 (regarding the adoption of common Article 3 as a fundamental innovation, perceived by most States as affecting their sovereignty); see also *id.* at 93–101 (indicating that similar reactions occurred when the ICRC presented its draft of what would become Additional Protocol II in 1977).

170. More specifically, secession is thus not condoned by international law, although it is not really prohibited either, because in very simple terms secession is a disruption to the factual units that create international law. The real issue is that of the international effects of the outcome of such a rebellion, whether it results in changes of territory or only changes of government. See, e.g., the discussion of secession in international law in the Supreme Court of Canada decision in Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

171. APII, *supra* note 24, pt. IV.

172. Again, see GCIV, *supra* note 24, art. 4; GCIII, *supra* note 24, art. 4; API, *supra* note 24, arts. 43, 44, and 50.

association of war with sovereignty poses demands that civil wars be similarly defined in terms of sovereignty for the sake of humanitarian law's theoretical applicability and concrete application.

The Geneva Conventions do not define what an "armed conflict" is, apart from a reference to the notion that "war" is implicitly considered as the legally formalized state of armed conflict.¹⁷³ Given this lack of definition and the fact that the term armed conflict is used in the Conventions and Protocols to refer to inter-State and intra-State situations, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia famously stated, on the basis of a transversal examination of the four Geneva Conventions, including their common Article 3, and the two additional Protocols, that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."¹⁷⁴ Simply stated, the ICTY confirms that the phenomenon of war can be apprehended by the law regardless of whether it is internal to the State or across its borders. Civil and international wars—declared or not—are species of the genus "armed conflict."¹⁷⁵ If civil wars are added to the description of "war," the configuration of the participants and the nature of the activity must be susceptible to a legal approach similarly based on distinction.¹⁷⁶

In both common Article 3 of the Geneva Conventions and Article 1 of the Additional Protocol II, what one can say is that non-international armed conflicts are seen as armed conflicts because the nature of violence affects—directly or indirectly—the sovereign itself. The paradigmatic case may occur when the representative of the sovereign is being overthrown, but another case can be that characterized by the government's loss of control over the sovereign's territory to the point that a "war" is being

173. See 1 JEAN PICTET, *THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY* 28 (1952).

174. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

175. According to the ICRC Commentary, common Article 3 can be understood as following the above-mentioned idea that "armed conflicts" are factually existing, rather than legally established, situations. See PICTET, *supra* note 173, at 48. ("Its observance does not depend upon preliminary discussions as to the nature of the conflict or the particular clauses to be respected").

176. It is important to mention that, contrary to what appears at first sight, such an analysis supports more complex sociological descriptions of war, *i.e.* descriptions of war that are precisely not based directly on the motives or objectives of the participants. See Stathis N. Kalyvas, *The Ontology of "Political Violence": Action and Identity in Civil Wars*, 1 PERSP. ON POL. 475 (2003), but see Paul Collier & Anke Hoeffler, *Greed and Grievance in Civil War* (World Bank Policy Research, Working Paper No. 2355, 2005), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2000/06/17/000094946_00060205420011/additional/115515322_20041117154030.pdf.

waged on it, with or without its own participation. The rather loose definition provided by the ICTY hinges upon the existence of a particular type of violence, defined by its extension in time, and a reference to the participants being essentially armed organizations. By armed organizations one can understand groups that either represent the State or are capable of challenging State control by the use of violence. As such, and as further limited by the lower threshold of “civil strife,” the notion of “armed conflict” would reach out to cover any long-term violence implying a threat to, or breakdown of, the legal order itself, such as in the case of the State facing paramilitary criminal organizations.¹⁷⁷ In all these cases, the term “armed groups” imply a permanence of violence resting on the existence of discreet entities essentially dedicated to the exercise of violence.¹⁷⁸

From that perspective, and despite the formal absence of civilians and combatants in civil wars, one can search the law for functional equivalents that would allow distinction to operate. The equivalence will be based on the notion that the struggle is between agents of the sovereign and agents of a would-be sovereign—signaled for instance by the fact that for all intents and purposes sovereignty, in the form of effective control, has ceased on a segment of the State’s territory. In international law, that view aligns humanitarian law with the rules of the law of State responsibility for international wrongful acts, which make States responsible for the pre-governmental actions of their government if it gained control of the State as an insurrectional movement.¹⁷⁹ The idea of a functional equivalence

177. Hence the critique of the militarization of law enforcement, which effectively transforms policing into war. See, e.g., Stephen Hill & Randall Beger, *A Paramilitary Policing Juggernaut*, 36 SOC. JUST. 25 (2009). On the militarization of law enforcement due to the militarization of non-State entities including criminal organizations, see HUMAN RIGHTS WATCH, *BREAKING THE GRIP? OBSTACLES TO JUSTICE FOR PARAMILITARY MAFIAS IN COLOMBIA* (2008); HUMAN RIGHTS WATCH, *UNIFORM IMPUNITY: MEXICO’S MISUSE OF MILITARY JUSTICE TO PROSECUTE ABUSES IN COUNTERNARCOTICS AND PUBLIC SECURITY OPERATIONS* (2009).

178. There is some discussion as to what constitutes an “armed group” and whether, in particular, criminal armed groups should, or even can, be distinguished from political armed groups. This last question as an impact on the sociology of war, but it does not immediately affect the question at hand, insofar as the issue is for now limited to the possibility of having a war between anything else than two or more States. On the issue of who is an “armed group.” See, e.g., INT’L COUNCIL ON HUMAN RIGHTS POLICY, *ENDS & MEANS: HUMAN RIGHTS APPROACHES TO ARMED GROUPS* 5 (1999), available at <http://www.reliefweb.int/library/documents/2001/EndsandMeans.pdf> (“In this report, by ‘armed groups’ we mean groups that are armed and use force to achieve their objectives and are not under state control.”) For an attempt at defining “armed groups” for the purpose of international humanitarian law (within which they are not defined), see NILS MELTZER, INT’L COMM. OF THE RED CROSS, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* 27 (2009).

179. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Rep. of the Int’l Law Comm’n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 45, U.N. Doc A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001). See also International Law Commission Y.B., *supra* note 46, at 50–52.

between the State as a public power and “armed groups,” understood to be would-be sovereigns or stand-ins for the sovereign, allows then for the hypothetical construction of “civilians” *a contrario*. Even though there cannot be an equivalent to prisoner of war status as a matter of international status in civil wars, the description of the civil war equivalent of the civilian can be based on the idea of the civil war type of combatant, which is implied in the ICTY definition of armed conflicts.

That is what the ICRC has proposed by defining the essence of the civil-war combatant with the notion of “continuous combat function.”¹⁸⁰ The immediate purpose of the ICRC was, in the context of discussions about the nonexistent “illegal-combatant” status,¹⁸¹ to define what “direct participation” in hostilities means for the purpose of cancelling civilian status. In the course of doing so, *a contrario* reasoning defines direct participation as necessarily something other than the participation by fighters in hostilities, which in turn suggests that, even in civil wars, there is such a thing as a fighter, which can be distinguished from a civilian. So much is clear from the provisions relating to the loss of civilian status themselves, since they are identical for international and non-international armed conflicts.¹⁸² The idea of a factually permanent fighter status responds in legal terms to the idea that there is a civilian status defined by the fact of never participating in hostilities, and the notion that—as common Article 3 seems to suggest—in civil wars also there are persons *hors de combat* (*i.e.* who are not simply not fighting, but are rather out of combat capacity). The existing law seems to acknowledge implicitly all these categories.¹⁸³ In other words, a civil war is a war, because of its connection to the State, both in terms of it being a challenge to sovereign rule, and in terms of being legally characterized by the overall application of the public / private distinction formalized in the St. Petersburg Declaration. Regardless of what one thinks of the functionalization of status for the purpose of maintaining the possibility of the laws of war being applicable in non-international settings,¹⁸⁴ which certainly shifts the background idea of legitimate force towards a *de facto* force-makes-legitimacy generalization, the reasoning

180. MELTZER, *supra* note 178. See generally the NYU Journal of International Law and Politics' forum on the topic of the ICRC document: *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 637–916 (2010).

181. That discussion was triggered by the Supreme Court of Israel's decision relating to targeting rules that govern military operations against individuals belonging to armed groups in the Occupied Territories (referred to generally as “targeted assassinations”). H CJ 768/02 The Pub. Comm. Against Torture in Israel v. The Gov't of Israel PD [2006] (Isr.). The ICRC study on “direct participation” is a response to the Court's conclusions and method.

182. API, *supra* note 24, arts. 51(2), 13(2).

183. MELTZER, *supra* note 178, at 28.

184. See Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5 (2010).

highlights that civil “wars” are considered and imagined as wars in relation to distinction. Even if only by the analogy of civil wars to the general social phenomenon of war, the connection of war to the sovereign is always there. Beyond the merely practical difficulties in implementing distinction in civil wars, that suggests that the idea of a war outside of the laws of war would mean a political disconnection of war from sovereignty.¹⁸⁵

Violence below the threshold marked by common Article 3 is criminal. It involves the operation of the legal order, rather than its continued existence, which is an overall objective common to international and non-international armed conflicts. In that sense, the case of civil “wars” justifies—just like the case of international wars—the designation of fighting individuals as the “enemy” (of the State). That is again well illustrated by the Lieber code, which is founded on a similarly public notion of war while in the context of a clearly designated “civil war,” a war over secession.¹⁸⁶ “Wars”, of whichever kind, are always associated with the exercise of public power, and more precisely a direct challenge to the holders of public power through military means (including cases where the sovereign has lost its public power in part of the territory). In this sense all “wars” are indeed associated with the sovereign border as the border of the space of operation of a government, the border of that space with the international plane, and its border with neighboring sovereigns.

That brings us to the end of the excursion through international humanitarian law. The contrived exhibition of the principle of distinction here serves the purpose of proposing a vision of international humanitarian law as a coherent system based on deceptively simple ideas about the world and human beings in it. Distinction is a principle, a general guiding standard that needs further implementation and interpretation to be more immediately understandable in the midst of everyday life. As such it is the object of debate and contestation. The overwhelming majority of people and States—if not everyone on the planet—agrees on the idea of distinction as a normative guide. But there is no consensus on what it means in practice: who is a legitimate target, who is a combatant, who is a civilian, when is someone a civilian, does only behavior or also circumstances affect civilian status, all those are legitimate questions. Depending on the answers, targeting and its corollaries, and especially proportionality, can be

185. The exporting of the “continuous combat function” back into the realm of international armed conflicts results in applying the adapted logic of civil wars to a situation that should be entirely governed by formal distinctions. In that sense, it entrenches the factual realities of contemporary warfare, such as massive privatization of war-making, without paying attention to the political message that underlies the collapse of formal distinctions. As such it is significant that “permanent combat function” is used in the inter-State context (or rather, regardless of the type of conflict in which one is) in the case of private military contractors. See MELTZER, *supra* note 178, at 38.

186. See Lieber Code, *supra* note 116, art. 82.

dramatically altered.¹⁸⁷ Even at the operational basis of distinction, there is a fundamental lack of consensus. States disagree over Articles 43 and 44 of the Additional Protocol I, which amend the basis for distinction in the system of the Geneva Conventions, in conjunction with the amendment of the definition of “armed conflict” in Article 1(4) of the Protocol.¹⁸⁸ There is disagreement over the legal definition of proportionality, a corollary of distinction, in terms of whether acceptable civilian loss should be measured against military advantage for the operation or advantage for the overall campaign.¹⁸⁹ And there is also the notion that more fundamental disagreement possibly exists—however marginal in actual military and diplomatic practice—on whether the system of the Geneva Conventions contains the sole possible approach to the idea of distinction. In other

187. Schmitt, *supra* note 64, at 169. The issue of calculating “proportionality” in cases of contemporary asymmetric violent conflicts is highlighted in a particularly dramatic fashion in exchanges concerning turn-of-the-millennium instances of use of force by the State of Israel against non-State actors based in Lebanon and Palestine. Proportionality was, for instance, central to the United Nations experts’ report concerning the 2006 war in Lebanon, and particularly as a frame for evaluating and then condemning Israel’s use of force as in many cases illegal. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Mission to Lebanon and Israel*, Human Rights Council, UN Doc. A/HRC/72/2 (Oct. 2, 2006); Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Mission to Lebanon and Israel*, Human Rights Council, UN Doc. A/HRC/72/2 (Oct. 2, 2006); Representative of the Secretary-General on Human Rights of Internally Displaced Persons, *Mission to Lebanon and Israel*, Human Rights Council, UN Doc. A/HRC/72/2 (Oct. 2, 2006); and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, *Mission to Lebanon and Israel*, (Sept. 7-14, September 2006), Human Rights Council, 2d session, UN Doc. A/HRC/27/2 (Oct. 2, 2006). Proportionality is also the terrain on which Israel’s use of force is defended and its military opponents’ use of force is criticized. See Alan Dershowitz, *Israel’s Policy Is Perfectly ‘Proportionate’: Hamas Are the Real War Criminals in this Conflict*, WALL ST. J., Jan. 2, 2009, <http://online.wsj.com/article/SB123085925621747981.html>. Some have, as a result of these experiences, proposed to reevaluate the notion and calculation of proportionality itself. See, e.g., Michael L. Gross, *The Second Lebanon War: The Question of Proportionality and the Prospect of Non-Lethal Warfare*, 7 J. MIL. ETHICS 1 (2008).

188. As regards the definition of combatants, an important example is the rejection by a number of States of the amendments to Article 4 of the Third Geneva Convention by Articles 43 to 45 of Additional Protocol I in 1977. The position of the United States has been outlined carefully, most often by components of the Armed Forces. See, e.g., Arthur John Armstrong, *Mercenaries and Freedom Fighters: The Legal Regime of the Combatant Under Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 30 JAG J. 125, (1978); API, *supra* note 24. Donald E. Hacker, *The Application of Prisoner-of-War Status to Guerrillas Under the First Protocol Additional to the Geneva Conventions of 1949*, 2 B.C. INT’L & COMP. L. REV. 131, 131-62 (1978); George S. Prugh, *American Issues and Friendly Reservations Regarding Protocol I, Additional to the Geneva Conventions*, 31 MIL. L. & L. WAR REV. 223 (1992).

189. See, e.g., U.S. DEPT. OF DEFENSE, *The Role of the Law of War*, in REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR, 31 I.L.M. 615 (1992) (providing a clear statement on proportionality as it is defended by the United States).

words, there is an ultimate interrogation, given these mounting practical difficulties, as to whether distinction between civilian and combatant can hold at all as a theoretical proposition for today's wars, as epitomized by the "War on Terror."¹⁹⁰ The changing realities of war in the field have prompted some to suggest that the expansion of the theater of war to include most often cities and other zones of civilian habitation, as well as the transformation of war into a partially privatized activity, would force the distinction between civilian and combatant to eventually yield to a distinction between innocent and guilty.¹⁹¹

Those are important questions. The fact is, however, that no one will defend a position of principle that says that distinction as such is not a valid idea, even though many will say that in practice it is implemented only with careful approximation and extreme difficulty. Getting rid of distinction, whichever distinction it is, will render war as we know it impossible—distinction introduces logic, order and regulation, which are indispensable for war, as opposed to chaotic destruction, to take place.¹⁹² In the terms used for framing this discussion, a vision of war that is disconnected from distinction yields a war disconnected from the sovereign and from the political legitimacy of force. It is a vision of war as a natural phenomenon or, in other words, Hobbes's weather-like vision of war. As such, that image of war is defensible—like any other position on the subject—and can be debated on political grounds, but that discussion is not the immediate question here. Here, the proposition is that humanitarian law, as we know it, is precisely not attached to that vision but is set up against that vision. The most important idea backing the whole system of international humanitarian law is that war as such is legitimate—war, to be war, must be accompanied by some notion of right. Whether war exists or does not exist or should not exist is unimportant to humanitarian law; but when war is, it is grasped as a public phenomenon that can be essentially legitimate, if conducted according to the rules. In the alternative vision, what truly governs is nature's laws. The system of humanitarian law is therefore set up with the image of a polity using force against the return to the state of nature, either by civil war or foreign invasion, all acts that can dissolve the social contract and thereby dissolve the polity. In the other vision, war is natural; it comes

190. In the course of the "War on Terror" the claim has been made that the non-state armed groups operate on the basis of a fundamentally different principle of distinction. See, e.g., MOHAMMAD-MAHMOUD OULD MOHAMEDOU, PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, HARVARD UNIVERSITY, NON-LINEARITY OF ENGAGEMENT TRANSNATIONAL ARMED GROUPS, INTERNATIONAL LAW, AND THE CONFLICT BETWEEN AL QAEDA AND THE UNITED STATES 3 (JULY 2005). See also the examples from Iraq provided in Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern Warfare*, 39 INT'L LAW. 733, 744-45 (2005). It should be noted that the author's thesis is that the principle of distinction "rests on an outdated view of the world." *Id.* at 733.

191. VAN CREVELD, *supra* note 37, at 225.

192. *Id.* at 90.

from the state of nature and continues into the polity under a different guise.¹⁹³

That general picture of peace within and war outside, created by the metaphor of the social contract, could also be tracked into different parts of international law, down to the constitutionalist Preamble of the Charter of the United Nations. The relationship of international law to war is a rather pessimistic one but one that is founded on the fundamental idea that social bonds will both end war inside and propel it outside, as shown by the UN Charter itself.¹⁹⁴ International human rights law shares this general picture, including the image of the social phenomenon of war itself. The idea of human rights has many complicated connections with constitutionalism and social contract theory already as such. But, beyond human rights law's own history and internal life, humanitarian law and human rights coexist within the larger political universe that gives humanitarian law, but also the *jus ad bellum*, the direction and orientation depicted above. What I want to discuss now in much briefer fashion is how human rights law can be read to express that same vision of political society, and highlight how the common ideological frame maintains human rights completely separate from the laws of war. That will constitute the political background to the technical magic of *lex specialis* in the era of fragmentation.

B. Human Rights Law: The Principle of Non-Discrimination

In the next section of this discussion, I will approach the encounter of humanitarian law with human rights in the context of human rights adjudication. The perspective is that of human rights' reception and treatment of war in parallel to the existence of humanitarian law. The premise of that reception of war into human rights law is that humanitarian law and human rights may share something in their respective relations to the phenomenon of war. In the present section, the purpose is to go into an exposition of the inner logic of human rights law, although not to the same extent or detail as what was done above with humanitarian law. What is needed is a suggestion of the depth of human rights law's identity in corresponding terms. The purpose is, similarly, not to defend a coherent image of the body of rules for its own sake, but rather, just like in the case of humanitarian law, to revive the notion that a very specific worldview is necessary for the idea of having an international law of human rights, which would be different from "trade law" or "the law of the sea." As announced

193. Michel Foucault, 4 February 1976 Lecture, in MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLÈGE DE FRANCE, 1975-76, at 87, at 92 (David Macey trans., 2003) (analyzing Hobbes's view of the primordial war).

194. U.N. Charter art. 107 ("Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.").

at the beginning of the discussion, if distinction constitutes the substantive *Grundnorm* of international humanitarian law, then I would suggest that non-discrimination plays the same role for human rights law.

1. *Not Humanitarian Law's Politics*

The body of human rights law is political in the very deep sense of engaging the operation of the State and sovereignty. It speaks of right and wrong ways for the State to use its sovereign means of regulation and coercion in relation to those subjected to them. In fundamental jurisprudential terms, what human rights and humanitarian law have in common is the regulation, and thereby legal construction, of relationships.¹⁹⁵ Like all law, they do not address things (weapons or hospitals) or relationships between persons and things (property or speech), but relationships between persons, natural or fictional. In the case of both bodies of law, legal norms define relations between the sovereign, other sovereigns, groups, individuals, and possibly corporate legal persons. What the contents of these relationships should be is subject to negotiation, reevaluation, and contestation in terms of creating rights, duties, privileges, and so on and so forth.

In the realm of humanitarian law, Canada thought for instance that protective power should be extended to non-recognized but habitually used emblems of humanitarian organizations, a proposition that was for all intents and purposes rejected in the final drafting of relevant international black-letter law.¹⁹⁶ In the realm of human rights, Spain, for its part, still thinks that discrimination against women in the line of dynastic succession to the throne of the kingdom should be acceptable, in the sense of being in conformity with the object and purpose of a treaty that seeks the elimination of all forms of discrimination against women.¹⁹⁷ And Australia, to take a last example at random, thinks that indigenous peoples do not have a right to self-determination.¹⁹⁸ The rights of individuals and groups—the construction of spheres of autonomy, frames of emancipation, and spaces of

195. See generally, for instance, Alf Ross, *Tû-tû*, 70 HARV. L. REV. 812 (1957); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE L.J. 16 (1913–14).

196. See Julie Gaudreau, *The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims*, 85 INT'L REV. RED CROSS 151 (2003).

197. See Committee on the Elimination of Discrimination Against Women, Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of all Forms of Discrimination Against Women, U.N. Doc. CEDAW/SP/2006/2, at 27 (Apr. 10, 2006).

198. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples: 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sep. 13, 2007). See generally Stefania Errico, *The UN Declaration on the Rights of Indigenous Peoples is Adopted: An Overview*, 7 HUM. RTS. L. REV. 756 (2007).

interaction in which they express their social existence or in which they are made to disappear—are obviously subject to dissensus and ensuing political persuasion, influence, and coercion. This happens at various points and levels of networks of social life, but in terms of international regulation it occurs within available spaces of diplomatic dialogue. Human rights law is one of those areas where lack of consensus has been made more visible, if only through the notorious issue of the number and content of reservations to human rights treaties.¹⁹⁹

The process of legalization of human rights is a political process. That process is, in its basic features, the same as that of international humanitarian law. From within the space of public dialogue and regulatory diplomacy, human rights law and humanitarian law can therefore also influence each other indirectly through the political process that gives birth to them and in which a variety of actors are involved.²⁰⁰ If the Geneva Conventions were not directly influenced by the parallel negotiation of the Universal Declaration of Human Rights (“UDHR” or “Declaration”),²⁰¹ Additional Protocol I of 1977 displays, even beyond the centrality of the absorption of a right of peoples to self-determination in its Article 1, some terminological parallels with human rights law.²⁰² That proximity highlights again that these bodies of law have different histories, but a shared political process from within which they talk to one another. That shared political process points to a fundamental commonality rooted in the international legal process itself: self-regulation by the sovereign. Each legal sub-system concerns itself with regulating a set of relationships involving the Sovereign. The two sets of relationships are distinct from one another, but

199. See Human Rights Committee, General Comment No. 24, Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, 52d Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Apr. 10, 1994), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6, 161 (May 12, 2003). Useful general commentaries on the issue of reservations and their relation to the object and purpose of human rights treaties can be found in Catherine Redgwell, *Reservation to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 INT'L & COMP. L. Q. 390 (1997) and Roberto Baratta, *Should Invalid Reservations to Human Rights Treaties Be Disregarded?*, 11 EUR. J. INT'L L. 413 (2000). The issue of reservations has generated in recent years a debate peculiar to US legal academia. See particularly, among the endless literature, Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 96 (2005). See also Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002).

200. See generally Meron, *supra* note 1.

201. Droege, *Affinities*, *supra* note 9, at 504.

202. Article 75 API on minimum guarantees is usually singled out for its echoes of human rights law. See INT'L RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 863 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987). One could also, however, mention the terminology used by common Article 3.

they overlap in the figure of the sovereign State and the exercise of its broadly defined sovereign means of coercion.

Human rights law is about the regulation of legitimate State power over individuals, groups, and the society at large. Once the meaning of that deep idea is forcibly made to pervade the whole body of otherwise random rules in the human rights corpus, it then becomes clearer how humanitarian law is formally and substantively different.²⁰³ The Preamble of the St. Petersburg Declaration was used above to extract a political narrative that would make the project of humanitarian law somehow coherent. Its counterpart in human rights law, from a parallel didactic viewpoint, is the Preamble to the 1948 Universal Declaration of Human Rights. As a public explanation of, and policy justification for, the operative parts of the Declaration, the Preamble can be seen as supporting ideologically the whole human rights corpus, whether universal or regional.²⁰⁴ The sense that the Declaration is, as any other international instrument, the outcome of complicated political

203. From the foregoing, it should be clear that the argument does not affect the possibility of adopting similar or even identical phrasing across the divide, or the sense of family resemblance which would prompt Amnesty International or Human Rights Watch to feel at home in the laws of war. The argument seeks here to clarify what type of family this is, and what type of family relationship we are assuming.

204. At the universal level, the Declaration left its mark in many subsequent treaties. See, e.g., example International Covenant on Economic, Social and Cultural Rights pmbl., *opened for signature* Dec. 16, 1966, 993, U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, pmbl., G.A. Res. 63/117 (2008); International Convention on the Elimination of All Forms of Racial Discrimination, pmbl., *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); G.A. Res. 44/128, at 207, U.N. Doc. A/RES/44/128 (Dec. 15, 1989); Siracusa Conference, Siracusa, It., Apr. 30-May 4, 1984, ¶ 65, U.N. Doc. E/CN.4/1985/4, Annex (Aug. 24, 1984); Declaration on Race and Racial Prejudice, U.N.E.S.C.O. Res. 3/1.1/2, pmbl., arts. 5-7, U.N. Doc. E/CN.4/Sub.2/1982/2/Add.1, annex V, ¶1, arts. 5-7 (Nov. 27, 1978); U.N. Educ., Sci., & Cultural Org. [UNESCO], Declaration of Principles on Tolerance, Gen. Conf. Res. 5.61, pmbl., UNESCO Doc. 28 C/Res. 5.61 (Nov. 16, 1995); International Convention on the Suppression and Punishment of the Crime of Apartheid, pmbl., *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 243 (*entered into force* July 18, 1976). Convention on the Elimination of All Forms of Discrimination against Women, pmbl., *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, pmbl., Dec. 6, 1999, 2131 U.N.T.S. 97 G.A. Res. 54/4, Annex, U.N. GAOR, 54th Sess. at 5, U.N. Doc. A/54/49 (Vol. I) (2000), (*entered into force* Dec. 22, 2000); Convention on the Political Rights of Women, pmbl., *opened for signature* Mar. 31, 1953, 193 U.N.T.S. 135; Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318 (XXIX), ¶ 10, U.N. GAOR, 29th Sess., Supp. No. 31, at 146, U.N. Doc. A/RES/29/3318 (Dec. 14, 1974); Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, pmbl., U.N. Doc. A/RES/48/104 (Dec. 20, 1993); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pmbl., *opened for signature* Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85 (*entered into force* June 26, 1987); Declaration of the Rights of the Child, pmbl., G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, at 19 (Nov. 20, 1959); Convention on the Rights of the Child, *supra* note 41, at pmbl.

processes and compromises on various fronts would certainly be obvious from the examination of its own drafting saga.²⁰⁵ But from the perspective of humanitarian law's relationship to human rights, what matters in the Declaration's Preamble, considered a political platform, is the vision of coherence that is proposed, independently of its authors or its authors' intentions. Unlike the image depicted in the St. Petersburg Declaration, the Universal Declaration's Preamble is a statement on the universal socio-political condition of human beings. As such, it derives the project of an international law of human rights from a principle that seems, as a starting point, to be diametrically opposed to the foundational and animating principle of distinction in humanitarian law, *i.e.* the principle of non-discrimination.

Following revolutionary constitutionalist statements that justified rebellion against something suddenly described as an illegitimate exercise of power,²⁰⁶ the Declaration asserts that the foundation of human rights law lies in human dignity, the pre-legally given worth of individuals grounded in their humanity.²⁰⁷ The social-contract vibe emanating from the structure of the Preamble comes here not from the specter of Hobbes' or Rousseau's state of nature, but instead from allusions to the legitimacy of State power being bounded by respect for human dignity and the potential for rebellion that stems from its possible disrespect (a motif that is more Lockean than anything else).²⁰⁸ According to the Preamble, human dignity is to be protected by the rule of law;²⁰⁹ from the rest of the Declaration and especially the contents of the actual rights, one is to understand that legal protection to mean the regulation of the sovereign's coercive power over the individual in a variety of dimensions of social life. In all cases the ground

205. An indispensable reference, discussing the political substance of legal and diplomatic maneuvering around the drafting of the UDHR, is Olivier Barsalou, *La guerre froide, Les États-Unis et la genèse de la Déclaration Universelle des Droits de l'Homme, 1945–1948* (2008) (unpublished LL.M. thesis, Université du Québec à Montréal), available at http://www.juris.uqam.ca/memoires/Barsalou_Memoire.pdf.

206. Stephen P. Marks, *From the "Single Confused Page" to the "Decalogue for Six Billion Persons": The Roots of the Universal Declaration of Human Rights in the French Revolution*, 20 HUM. RTS. Q. 459 (1998).

207. UDHR, *supra* note 15, pmb1, ¶ 1 (stating that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.").

208. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 77, 94–95 (J.W. Gough ed., Basil, Blackwell, & Mott 1948) (1690). A discussion of the right to rebel in the era of international human rights law can be found in the classic Jordan J. Paust, *Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility*, 32 EMORY L.J. 545 (1983). One should note already, based on the fundamental and foundational nature of that "right" to rebel, that it is not, and cannot be, part of the legal constitution of the Hobbesian Leviathan. See CARL SCHMITT, *THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS: MEANING AND FAILURE OF A POLITICAL SYMBOL* 46–47 (George Schwab & Erna Hilfstein trans., 2008).

209. UDHR, *supra* note 15, pmb1., ¶ 3.

for constraining or channeling sovereign power is a version of “human nature” endowed with dignity independently of social life,²¹⁰ which results in all human beings being endowed with the same rights by the mere fact of their being human. Existential equality generates the necessity for the State not to make distinctions among human beings.

The choice of regulatory tool is, in concrete terms, that of expressing the bounded legitimacy of sovereign violence, in whatever shape or form it comes, in a set of rights held permanently by all individuals on the one hand, and a set of corollary duties that frame that exercise of power by the State on the other hand. How this is, formally speaking, unlike humanitarian law is arguably self-evident, if one focuses on the type of legal relationship that is envisaged between the relevant legal subjects.²¹¹ The formal frame of human rights law is based on the notion of presupposed perfect equality among human beings; that leads to a delegation of coercive power that will be constrained by a duty for the holder of that power to relate to all in a way that acknowledges that equal worth and value. What is meant is not that the State should not discriminate, but rather that the State cannot, as a State, discriminate. Non-discrimination is in the essence of legitimate State power—discrimination makes State power illegitimate and the operator of that power a usurper. Hence the presupposition of a pre-political or pre-contractual “right” to rebel, a mere flipside of the pre-political “right” to contract the polity into existence.

2. *Not Humanitarian Law’s Sovereignty*

The fundamental or foundational character of non-discrimination is reiterated and reinforced throughout the law of human rights. At its most structurally obvious, it shows its mysterious *Grundnorm* dimension in the

210. For a famously critical stance on this approach, see Exec. Bd. of the Am. Anthropological Ass’n, *Statement on Human Rights*, 49 AM. ANTHROPOLOGICAL ASS’N 539, 539–43 (1947). In political thought, the social approach to human rights as that of rights of “man in civil society” was provided by Edmund Burke. See, e.g., EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 218 (J.C.D. Clark ed., 2001) (1790).

211. I should insist that it is naturally always possible to look at human rights and humanitarian law from a perspective that purports to see beyond legal relations and into the substance of life. Such are perspectives that treat human rights and humanitarian law as instruments for a seemingly consensual objective, moral, ethical, or otherwise independent of all political debate. In that case it is quite understandable that legal categories may be mixed and matched, since law and legal language are not considered to contribute meaningfully to the political construction of the world. See, e.g., MARY KALDOR, *NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA* 12 (2nd ed. 2007). The author describes contemporary wars as “a mixture of war, crime and human rights violations, so the agents of cosmopolitan law-enforcement have to be a mixture of soldiers and police.” *Id.* In that case, it is indicative that one will encounter the all-encompassing referent of “violence,” which produces a sense of indistinction that must obviously be as politically meaningful as distinction is. E.g., INT’L COMM. OF THE RED CROSS, *VIOLENCE AND THE USE OF FORCE* (2008).

fact that the duty not to discriminate has, strictly speaking, no fully independent normative status and is indeed approached as part of the operation of (legitimate) sovereign power itself.²¹² Non-discrimination refers not to a discrete right-duty relationship between State and individual, but to the manner in which the State discharges any and all of the duties corresponding to any and all of the rights held by (or conferred to) the relevant individuals. The structural necessity of non-discrimination goes thus to the heart of the operation of the State apparatus. More than simply a formal requirement, it speaks to the impossibility for legitimate power to consider irrelevant differences that are otherwise made to count in the life of human beings only through an arbitrary organization of society. It means therefore also an obligation for the State to treat differently individuals who are situated differently.²¹³ But, even further along, it is understood to require a showing by the State that it is not contaminated by (civil) society's own discriminatory biases,²¹⁴ both in its actual operation (*i.e.* in fulfilling duties to respect and protect) and in its setting of examples and other educational activities (*i.e.* in abiding by the duties to promote and fulfill).²¹⁵ The prohibition of discrimination is tied in black-letter law to all rights, based on the very definition of the State duties corresponding to those rights in international instruments.²¹⁶ Moreover, the prohibition of discrimination

212. *E.g.*, *X and Y v. The Netherlands*, 91 Eur. Ct. H.R. (ser. A) at 32 (1985) ("Article 14 has no independent existence; it constitutes one particular element (non-discrimination) of each of the rights safeguarded by the Convention. The Articles enshrining those rights may be violated alone or in conjunction with Article 14.").

213. *E.g.*, *Price v. United Kingdom*, App. No. 33394/96 Eur. Ct. H.R. (2001), 34 EHRR 53, available at <http://cmiskp.echr.coe.int>.

214. *Nachova v. Bulgaria* revisits the former, blindly rigid, approach to the State's relationship to patent social discrimination. App. Nos. 43577/98 and 43579/98 Eur. Ct. H.R. (2005), <http://cmiskp.echr.coe.int>. The previous argumentative line concerning the implementation of Article 14 of the European Convention, and which led the Court to systematically ignore a social background of patent discrimination, was followed in a series of cases otherwise displaying the tragic fate of Roma individuals in Central and Eastern Europe. It is well represented by *Velikova v. Bulgaria*, App. No 41488/98 Eur. Ct. H.R. (2000), <http://cmiskp.echr.coe.int>.

215. *See generally*, in line with the *Velikova-Nachova* line of development in the ECHR, the case of *Regina v. Immigration Officer at Prague Airport ex parte European Roma Rights Centre (Roma Rights Centre)* UKHL 55 (appeal taken from Eng.) [2004], where the United Kingdom's House of Lords finds a violation by the United Kingdom of the prohibition of racial discrimination in the absence of actual exercise of jurisdiction, based on the independent obligation to promote the abolition of racial discrimination. The distinction between the four types of State duties corresponding to each human right is now standard in human rights practice. *See, e.g.*, *Social and Economic Rights Action Campaign v. Nigeria, African Comm'n on Human & Peoples' Rights*, 15th Activity Report, Comm'n No. 155/96, 37 ¶46, AU Doc. ACHPR/COMM/A044/1ACHPR/COMM/A044/1 (2002).

216. International Covenant on Civil and Political Rights art. 2, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] and ICESCR, *supra* note 204, art. 2. ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race,

remains, with its meta–status, in situations of emergency, which in human rights law codify the customary institution of the “state of necessity” by allowing non–respect of human rights norms to be excused and explained in the form of a suspension of the law.²¹⁷ Logically, when the State is defending its own life, it is still defending it as a State, and what makes it act like a State is its non–discriminatory use of power even while substantive rights are curtailed.

Non–discrimination is a political program based on the more general idea of perfect equality. In its implementation it is contested, as shown by divergent conceptions on the proper scope of a norm of equality based on a common human nature. At the international level, that the idea of non–discrimination is politically expounded, as opposed to being ethically transparent, is plainly demonstrated by the fact that it took about sixty years for States to legally acknowledge that the human dignity of persons with disabilities needed particular protection.²¹⁸ The centrality of “non discrimination,” as it relates to the idea of human dignity, can be seen as contingent on the Declaration’s historical context, in the sense that the historical process of implementation of non–discrimination starts with its assertion and the reasons for making it the primordial legal expression of human dignity. As the basis of the universalism of international human rights law, understood as a positivist legal tool for the protection of human dignity, the contingency of the human rights project is shown in additional, contextualized formulations of human dignity, particularly in regionalist human rights enterprises.²¹⁹ In that sense, human dignity itself is subject to debate, regardless of a possible consensus on the formal notion of common human dignity. The endeavor of legal protection for human dignity can be associated, depending on the larger social and political surroundings, with the establishment of continental public order²²⁰ or even with anti–colonialism, the protection of peoples’ rights, and social duties towards the community.²²¹

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).

217. ICCPR, *supra* note 216, at art. 4.

218. Convention of the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 993 U.N.T.S. 3 (entered into force May 3, 2008).

219. For the framing role given to democratic institutions, even before the expression of human dignity, see for example, American Convention on Human Rights pmb., Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

220. *E.g.*, *Loizidou v. Turkey*, App. No. 15318/89, Preliminary Objections, Judgment, Eur. Ct. H.R. ¶ 75 (1995), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=loizidou&sessionId=66079020&skin=hudoc-en> (stating that where the Court considers “the Convention as a constitutional instrument of European public order.”).

221. African Charter on Human and Peoples’ Rights pmb., § § 3, 4, 5, 6, 8, *opened for signature* June 27, 1981, OAU DOC. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter].

Non-discrimination, as intimately tied to the idea of universal human rights, is not necessarily accepted as the center of human rights by visions that do not associate human rights with legal protection.²²² But as a matter of legal architecture for international human rights, non-discrimination is unavoidably at the heart of the political matter. Given the prescriptive (and not descriptive) nature of human rights instruments, the legal principle of non-discrimination reinforces the notion that human rights standards and norms are enshrined in international law as a reminder of the State's constitutional structure, in which its agents operate legitimately over territorial subjects. Various notions of the relationship between State, individual, and society will fuel political debate within the frame of human rights law on the different ways for the State to relate to human beings on a basis that acknowledges in society their pre-social equality.²²³ This has notoriously been the focus of critical analysis in relationship to other modes of struggles for emancipation that are not obsessed with the State, the individual, or rights.²²⁴ The background to those conversations is the overall question of the relationship between the State and individuals under their power, even when that exclusive formalization of the political realm in the

222. See e.g., Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 319 (2004).

223. A famous instantiation of this idea would be the statement of political theory pronounced by the United States of America on the occasion of States' comments on a draft document produced by the Chairperson of the UN Working Group on the Right to Development:

There is no international consensus on the precise meaning of the right to development. Given the lack of conceptual clarity that has surrounded the right to development since its inception, we believe that it will be very difficult for the international community to arrive at a consensus on its implementation. The most fundamental flaw reflected in the approach of the Independent Expert concerning the development compact is the idea that economic, social and cultural rights are entitlements that require correlated legal duties and obligations. At best, economic, social and cultural rights are goals that can only be achieved progressively, not guarantees. Therefore, while access to food, health services and quality education are at the top of any list of development goals, to speak of them as rights turns the citizens of developing countries into objects of development rather than subjects in control of their own destiny.

U.N. Human Rights Comm'n., Open-Ended Working Group on the Right to Development, The Right to Development, U.N. E, 57th Sess., 26 mtg. at 46, U.N. Doc. E/CN.4/2001/26, at 46 (Mar. 20, 2001).

224. For indispensable pieces of reading material, see David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002); Martti Koskeniemi, *The Effect of Rights in Political Culture*, in THE EU AND HUMAN RIGHTS 99 (Philip Alston ed., 1999); and the particularly lovable Martti Koskeniemi, *Human Rights, Politics, and Love*, 4 MENNESKER & RETTIGHETER / NORDIC J. HUM. RTS., at 33, 33-45 (2001).

figure of the State and its legal system is rejected. What comes as an unsurprising conclusion is that the image of the realm where human rights operate as a framing guide for the legitimate power of the State over its liberal subjects is not that of “war.” If war, in the social–contract image displayed above, is the relationship resulting from the constitution of the polity, then human rights law refers to a description of the ideal polity in its daily operation, within the boundaries that fence off the real state of war among communities.

The best illustration of human rights as a regulatory framework for the normal operation of sovereignty on the basis of non–discrimination is given by so–called economic, social, and cultural rights. This is so especially when they are adjudicated, as they are in the most prevalent but not exclusive way, in the form of a judicial examination of the rationality, reasonableness and transparency of State–designed policy within the framework of the separation of powers.²²⁵ The importance of economic and social rights in this context lies in the fact that they highlight the association of human rights with the legitimacy of State action *qua* State action, including when it takes the form of so–called “policy” and not simply that of a discreet action or omission. One of the criteria for the legitimacy of the State’s operation in devising and implementing policy is precisely its regard for discriminatory biases and effects,²²⁶ which brings into focus the relation between legitimacy, discrimination, and human dignity.²²⁷ When trying to recapture from a legal perspective the meaning of “human dignity” some jurisdictions have unsurprisingly expounded it in terms of a respect for equality, devising thus as the test for a violation of human dignity the evidence of discrimination among or against human beings on irrational bases.²²⁸ Human dignity in society cannot but be a relational notion, and the

225. This is the approach to economic and social rights notoriously followed by the Constitutional Court of South Africa. See for instance the landmark case, *Sobramoney v. Minister of Health (Kwazulu–Natal)* 1998 (1) SA 765 (CC) (S. Afr.). See also *Minister of Health and Others v. Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) (S. Afr.).

226. See, e.g., *Khosa v. Minister of Social Development/ Mahlaule and Another v. Minister of Social Development* 2004 (6) SA 505 (CC) (S. Afr.) (dealing with the element of discrimination in the application of the constitutional standard of reasonableness as regards implementation of economic and social rights in general, and access to social security in particular.).

227. As the Constitutional Court of South Africa said of South Africa’s basic law, “The socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom.” *Id.* at ¶ 40.

228. In *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497, 501 (Can.), the Supreme Court of Canada explained the purpose of Section 15 of the Canadian Charter of Rights and Freedoms, relating to “equality rights,” as follows:

to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy

respect for human dignity in society manifests itself as the recognition that from the perspective of sovereign power all individuals are of equal worth.

The centrality of non-discrimination sets human rights apart from humanitarian law in that non-discrimination is a rule that becomes relevant for the laws of war only once distinction has occurred (*i.e.* discrimination based on belonging to a legally relevant and defined group or class).²²⁹ The operational logic of humanitarian law is manifestly unlike that of human rights, since it yields an understandable prescriptive discrimination based on rank, within the already normatively segregated class of those entitled to prisoner-of-war status.²³⁰ The difference in logic is intimately connected with the fact that there is a “war,” or more precisely that there is a “war” as understood in terms of humanitarian law. Against the social contract metaphor, the notion of a war as a threat to the polity and therefore the social contract itself is illuminating here for legal purposes. From the perspective of non-discrimination, the proposed normative framework for cases of “civil strife” or “internal disturbances”²³¹ expresses the point of

equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

229. For instance, see GCIII, *supra* note 24, at art. 12, regarding non-discrimination after POW designation, or see GCIV, *supra* note 24, at art. 27, regarding non-discrimination after designation of individuals as “protected person.”

230. *E.g.*, GCIII, *supra* note 24, at arts. 44, 49, 60. As the European Court of Human Rights observed, significantly not in the terms of a *lex generalis* / *lex specialis* relationship:

The hierarchical structure inherent in armies entails differentiation according to rank. Corresponding to the various ranks are differing responsibilities which in their turn justify certain inequalities of treatment in the disciplinary sphere. Such inequalities are traditionally encountered in the Contracting States and are tolerated by international humanitarian law (paragraph 140 of the Commission’s report: Article 88 of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War). In this respect, the European Convention allows the competent national authorities a considerable margin of appreciation.

Engel and Others v. Netherlands, App. Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Eur. Ct. H.R. (1976) at ¶ 72, available at <http://cmiskp.ech.coe.int>.

231. The notion of that space of violence as an autonomous space in need for specific regulation comes from Article 1(2) APII: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” APII, *supra* note 24. The formulation of a limit, seemingly defined as a threshold intensity, to what the law of non-international armed conflict applies is repeated in the amended Protocol on landmines and booby-traps to the Conventional Weapons Convention when, among other objectives of the process, the amendments extended the original Protocol to conflicts not of an international character. See Convention on Certain Conventional Weapons, *supra* note 143. See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, As

contact between international humanitarian law and human rights law. Legally speaking, those situations constitute the point at which the sovereign declares the state of necessity for the purpose of saving its own life,²³² that is, saving the sovereign legal order as the depository of a power otherwise regulated and channeled by human rights norms.

For that particular purpose the temporary suspension of rights is warranted in that the disappearance of the State would mean the definitive annihilation of human rights law by automatic implication. Yet the suspension of human rights law is not followed by the application of humanitarian law, given that the level of violence required for a “state of emergency to exist” is not necessarily that of a “war.”²³³ In the proposed regulatory frameworks for that in-between space,²³⁴ one finds the principle of non-discrimination (contained in Article 4 of ICCPR, for instance) effectively coexisting with the principle of distinction (as indicated in the proposed “minimum standards” for the regulation of the grey zone of violence between peace and armed conflict).²³⁵ The sovereign is, in other words, foreseen as caught between the exercise of law enforcement and the

Amended on 3 May 3, 1996 Annexed to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects, at art. 1(2), May 3, 1996, 2048 U.N.T.S. 93 [hereinafter Mines Protocol II]. See also Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices art. 1, May 3, 1996, 2048 U.N.T.S. 133 [hereinafter Use of Mines, Booby-traps and Other Devices].

232. The European Convention puts it very well, by framing the codification of the “state of necessity” as a “*time of war or other public emergency threatening the life of the nation.*” Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 312 E.T.S. 5 [hereinafter ECHR] (emphasis added). This formulation connects with the definition of the “state of necessity” as a specific circumstance precluding wrongfulness in the law of State responsibility (a circumstance that, in the peculiar case of human rights, transforms a violation into a legitimate “suspension”). See *Rainbow Warrior Affair* (N.Z. v. Fr.) 20 R.I.A.A. 254 (1990).

233. This is the classic way of presenting the state of emergency as situated somehow “between” the respective scopes of application of human rights law and humanitarian law. See, e.g., FRANÇOISE BOUCHET-SAULNIER, *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* 113 (Laura Brav ed., Laura Brav trans., Rowman & Littlefield Publishers 2nd ed. 2007) (2001).

234. See, e.g., Institute for Human Rights Experts Conference, Turku/Åbo, Fin., Nov. 30-Dec. 2, 1990, *Declaration on Minimum Humanitarian Standards*, reprinted in Comm’n on Human Rights, Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned, U.N. Doc. E/CN.4/Sub.2/1991 (Aug., 12, 1991) (prepared by Theo van Boven & Asbjørn Eide) [hereinafter Turku Declaration]. See also Theodor Meron, *Towards a Humanitarian Declaration of Internal Strife*, 78 AM. J. INT’L L. 859 (1984); THEODOR MERON, *HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION* (1987); Theodor Meron, *Draft Model Declaration on Internal Strife*, 262 INT’L REV. RED CROSS 59, 59–76 (1988); Theodore Meron & Allan Rosas, *A Declaration of Minimum Humanitarian Standards*, 85 AM. J. INT’L L. 375, 375–81 (1991).

235. Non-discrimination and distinction appear in Articles 2 and 5 of the 1990 Turku Declaration, respectively. Turku Declaration, *supra* note 234, arts. 2, 5.

defense of the legal order itself against individuals on the verge of being “enemies.”

The relationship between human rights and humanitarian law on the terrain where formal sovereignty is under threat confirms the loosely common social contract image that allows one to picture, or narrate, the relationship of individuals to States in international law, following what was done above in examining humanitarian law. First, the State is formed to provide for the (variously understood) security of individuals. But then, the escalation of violence and disorder (re)opens the possibility of a return to a situation of generalized risk (the “state of nature”). At bottom, the situation is not (anymore) regulated and sanctioned by a centralized power mandated to speak “the law” and guarantee social normalcy. In that general background picture, human rights law is concerned with the legitimacy and modes of imposition of State power, and defines its abuse and prevents or channels its arbitrariness. Humanitarian law, in turn, is concerned with the defense of the sovereign legal order, within which arbitrariness is an issue for the legitimacy of the Sovereign's power over its legal subjects.

3. Human Dignity Against War: Legitimacies of Ending Life

Humanitarian law's logic, as translated into the principle of distinction, is not based on formal and universal equality but rather, in fundamentally contrary fashion, on status.²³⁶ It absorbs the prohibition of discrimination within a system of pervasive and necessary discrimination among classes of individuals in relationship to a variety of sovereigns.²³⁷ Saying that the laws of war are preoccupied with the protection of “human” dignity is therefore ambiguous at best. An immediate problem for “human dignity” as hypothetical focus of humanitarian law is the apparent lack of deliberate regulation by the laws of war of the sovereign's relation to its own agents (if we leave aside loopholes, gaps, contradictions, and other gifts to legal interpretation). The idea that humanitarian law has human dignity as its first concern would amount therefore to saying that the dignity of soldiers is nonexistent or unimportant.²³⁸ That would actually constitute an exactly opposite result to that of the traditional account of humanitarian law based on distinction. The latter would explain how the State's own citizens may

236. See generally the very enlightening discussion of the complicated relationships between humanitarian law and human rights law that result from the logic of “status” in the laws of war, in David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16 EUR. J. INT'L L. 171 (2005) (discussing among other things the Inter-American Commission on Human Rights' confusing importation of status into human rights law in its report on human rights and terrorism.).

237. For a different account, see Jelena Pejic, *Non-Discrimination and Armed Conflict*, 83 INT'L REV. RED CROSS 183 (2001).

238. For an intriguing essay on this general notion, see Eyal Benvenisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81 (2006).

come back under the scope of the State's own humanitarian obligations through the application of traditional status categories. From there, one can see that putting human dignity at the center of humanitarian law conveys, in more abstract fashion, that the situation of war does not fundamentally alter the very issue of human dignity in society. At bottom, human rights law is in many different ways developed for the purpose of not only recognizing and guarding human dignity, but also excavating it, highlighting it, concretizing it, and implementing it for the purpose of generating true equality.²³⁹ From there, the continuity of law's concern for "human dignity" into the situation of armed conflict would imply that human dignity can still be realized despite war, where, apart from everything else that may intuitively seem inimical to human rights, discrimination among individuals is even factually a given.

Unlike human rights law, the laws of war confer very limited individual rights to persons. Individual rights are a very secondary regulatory tool, and these rights, which are not necessarily attached to "human dignity,"²⁴⁰ are based in all cases on the labeling of individuals.²⁴¹ This includes the general safety net of Article 75 in Additional Protocol I, which itself implies that the lack of categorization constitutes some sort of anomaly, and grants fundamental protections (which look like human rights standards) based explicitly on the lack of categorization (*i.e.* individuals do not get better treatment precisely because they do not fall neatly in the category of

239. An early example is the Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], *supra* note 204. The object and purpose of the Convention has been defined in the following terms, in the context of a discussion of the special measures mandated by the Convention to compensate for historical discrimination (*i.e.* positive discrimination, or affirmative action):

The scope and meaning of article 4, paragraph 1, must be determined in the context of the overall object and purpose of the Convention, which is to eliminate all forms of discrimination against women with a view to achieving women's *de jure* and *de facto* equality with men in the enjoyment of their human rights and fundamental freedoms. States parties to the Convention are under a legal obligation to respect, protect, promote and fulfill this right to non-discrimination for women and to ensure the development and advancement of women in order to improve their position to one of *de jure* as well as *de facto* equality with men.

Committee on the Elimination of Discrimination Against Women, General Recommendation No. 25, on Article 4, Paragraph 1, of CEDAW, on Temporary Special Measures, in Report of the Committee on the Elimination of Discrimination against Women, 30th Sess. (Jan. 12–30, 2004), 31st Sess. (Jul. 6–23, 2004), ¶ 3, U.N. Doc. A/59/38, G.A.O.R. 59th Sess. Supp. No. 38 (2004).

240. For instance, the right of petition given both to prisoners (see GCIII, *supra* note 24, at art. 42) and civilian internees (see GCIV, *supra* note 24, at art. 24).

241. *E.g.*, GCIII, *supra* note 24, at art. 78 (regarding the right of prisoners of war to file complaints).

interned civilians or detained prisoners). Regarding what was suggested above about the jurisprudential relationship between human dignity and equality, the principle of distinction should therefore be deemed itself fundamentally incompatible with human dignity.²⁴² That incompatibility would in turn give some sort of legitimacy to the emergence of human rights lingo when distinctions are deemed not to be possible.²⁴³

From there, one should think that the discrimination between combatants and civilians with regard to the fundamental “right not to be arbitrarily deprived of one’s life” is incomprehensible to the logic of human rights, precisely because of human dignity itself. It becomes acceptable only with the irruption of international humanitarian law, through the operation of the *lex specialis* principle of interpretation, according to which the more specific law prevails over the more general law.²⁴⁴ Considering that humanitarian law is “more specific” than human rights in the case of war because it is designed precisely for situations of war, the message of the *lex specialis* interpretive maxim is that one should use humanitarian law for the purpose of defining what “arbitrary” deprivation would mean in times of war.²⁴⁵

If one seeks responses to the question of human rights law's attitude towards discrimination in war in the language of the European Convention on Human Rights, for instance, a significant element will be the recurrent shadow of the “state of emergency” in the background relationship between humanitarian law and human rights. Schematically, Article 2 of the European Convention allows intentional deprivation of life essentially if it is the result of necessary and proportionate use of force (a) in defense against unlawful use of force, (b) in support of a lawful arrest, or (c) in the quelling of an insurrection.²⁴⁶ Article 15 of the Convention, which codifies the “state of emergency” for the purpose of that instrument, declares that Article 2 is non-derogable, except for “deaths resulting from lawful acts of war.” The combination of the two provisions means that for the human rights corpus, intentional killing in war (in contrast to intentional killing in a situation of insurrection) is presumably a violation of the right to life, but is considered a “derogation” to the extent that it is a “lawful” act of war. By “lawful” act of war, one should understand an act that is legalized by the *lex specialis* and not human rights law itself, since human rights law itself does not list “lawful” war-deaths alongside “lawful” deaths resulting from law enforcement and counter-insurgency in its description of the limits to the

242. In *Law v. Canada*, the Supreme Court of Canada said that the “imposition of disadvantage, stereotyping or political or social prejudice” would constitute “a violation of essential human dignity.” See *Law*, *supra* note 228, at 501.

243. That would apply also then to the context of non-international armed conflicts, where formal distinctions are not made. See *GCI*, *supra* note 24, at art. 3.

244. Vienna Convention, *supra* note 46, at art. 30.

245. *Nuclear Weapons Legality*, 1996 I.C.J. 226, ¶ 25.

246. ECHR, *supra* note 232, art. 2.

right to life.²⁴⁷ This legal construction of the right to life, which requires humanitarian law to make lawful something that presumably would be structurally abhorrent under human rights²⁴⁸ (like discrimination based on status, national origin, language, religion or whatever other social label, for the exclusive purpose of killing), is the fundamental meaning of the *lex specialis* story and points to the deep difference between the two bodies of law.

The point of contact between human rights and humanitarian law is not the dignity of the human being, but the sovereign border, the space of sovereign power. Associating human rights and humanitarian law on the basis of some substantive standard, moral or otherwise, may sound reasonable or even desirable. It has, however, deep consequences in the sense of normalizing the operation of the logic of one of those bodies of law in the “normal” domain of operation of the other. At a very fundamental level, as intuited above in the European Convention’s dealings with war–deaths, human rights are associated with peace,²⁴⁹ not in the sense of their material scope of application, but in the sense of their *raison d’être*. The universal human rights regime, as derived from the Charter of the United Nations, shares in the general project of preventing war,²⁵⁰ a goal reasserted in one way or another in a variety of human rights instruments²⁵¹ and an idea that should be taken very seriously when considering human rights as part of the process of contemporary international law. Human rights law should be approached as fundamentally hostile to war, given that war carries the risk of disappearance of the State as the provider of human rights protection, not to mention the physical disappearance of human beings and their social environment, as constituted by the social contract. As the Inter–American Commission said very simply with reference to human rights instruments in general, “one of their purposes is to prevent warfare.”²⁵²

Conversely, humanitarian law is for its part foundationally agnostic about war, within the limits of its relationship to the *ius ad bellum*.²⁵³ This

247. ECHR, *supra* note 232, art. 15.2.

248. As indicated by human rights bodies, the notion that limitations to the exercise of human rights must be provisions previously laid down in the law is to be understood as referring not only to domestic law but also international law. See, e.g., *Jawara v. The Gambia*, African Comm’n on Human & Peoples’ Rights, 13th Activity Report, Comm’c Nos. 147/95 and 149/96 (2000), 102, 104, 106 ¶¶ 43, 58, 68, *reprinted in*, COMPENDIUM OF KEY HUMAN RIGHTS INSTRUMENTS OF THE AFRICAN UNION, *supra* note 221, at 211–14.

249. UDHR, *supra* note 15, at pmb., ¶ 1.

250. U.N. Charter pmb., art. 1(1).

251. E.g., ICCPR, *supra* note 216, at pmb.; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 204, at pmb.; ICESCR, *supra* note 204.

252. *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev ¶ 158 (1997).

253. If one leaves aside more contemporary debates about humanitarian intervention, the “responsibility to protect”, and other marks of a resurgence of just war theory, a nice

indifference about whether war should or should not exist is how humanitarian law legitimates war; it essentially receives it as a fact and then proceeds to regulate it as a social activity within international law. Human rights law in turn legitimates State violence by the standard legal process of inclusive/exclusive regulation; for instance, under the definition of torture and inhumane treatment, the State is allowed to abandon inmates to the formally unsolicited and unsponsored yet known, tolerated, and potentially extreme violence of prisons.²⁵⁴ But human rights cannot be used as easily for facilitating or favoring war in ideological terms.²⁵⁵ The importance of human rights law's stance towards war, understood against the background of a loose contractualist vision of political society, makes sense of the otherwise strange fact that two prohibitions targeting duties potentially extending to individuals are inserted, within one common provision, among

example of the attitude of humanitarian law to the *jus ad bellum* appears in the way in which the first sentences of the Preamble to the Institute of International Law's 1880 *Oxford Manual* frame the whole codification exercise:

War holds a great place in history, and it is not to be supposed that men will soon give it up – in spite of the protests which it arouses and the horror which it inspires – because it appears to be the only possible issue of disputes which threaten the existence of States, their liberty, their vital interests. But the gradual improvement in customs should be reflected in the method of conducting war. It is worthy of civilized nations to seek, as has been well said, “to restrain the destructive force of war, while recognizing its inexorable necessities.”

THE LAWS OF WAR ON LAND, *supra* note 71, at 36. See THE LAWS OF ARMED CONFLICTS, *supra* note 44, at 37.

254. See, e.g., HUMAN RIGHTS WATCH, NO ESCAPE: MALE-RAPE IN U.S. PRISONS (2001) (charging State authorities with the legal responsibility for preventable and widespread sexual violence perpetrated in penitentiary establishments in the United States).

255. This opens up the whole issue of humanitarian intervention and its contemporary avatar, the “responsibility to protect” or “R2P.” This is not the place to engage fully with those issues. But one can say at least that R2P, and similar discussions concerning human rights and the demise of traditional sovereignty, are based on an alternative reading of human rights, in which they are not considered formal and subsumed structurally under international law, but are rather approached as substantive and of a moral character. Human rights are thereby used for the purpose of redefining sovereignty in reverse: sovereignty exists so long as human rights are protected, as opposed to the vision discussed above, which says that human rights exist as long as sovereignty exists. From the latter perspective, the International Court of Justice's frowning upon the idea that the use of military force could be justified by an appeal to human rights is still comprehensible as a political take. From the former perspective it is an unwanted excess of formalist legalism. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Judgment 14, 268 (June 27). For a recent example of the systematically substantivist reading of human rights, which results in a substantivist reading of sovereignty, see the programmatic Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513 (2009). Compare then with the project developed by Ruti Teitel, mentioned *supra* note 7.

the list of civil and political rights: the prohibition of war propaganda and the prohibition of incitement to discrimination.²⁵⁶ Those two are intimately tied by their common association with the legitimation of extra-contractual State authority and exercise of authority by virtue of force.

4. Human Indignity in the Convergence of Humanitarian Law and Human Rights

From the perspective of the relationship between the two bodies of norms, one should then slowly attune to the sense of perversion that comes with the infiltration of human rights lingo into the domain of war. That infiltration happens here, and quite beside the direct legitimation of physical force by the assumed program or grand ideal of human rights,²⁵⁷ through the idea that humanitarian law is ultimately concerned with human dignity or, more loosely speaking, the idea that human rights and humanitarian are part of the same substantive ideal or project. Both implementing the distinction between human rights and humanitarian law, on the one hand, and neglecting it, on the other hand, have operational ramifications. Given their separate original purposes, there is nothing extraordinary in their operating side by side. Yet from that statement what follows is that the protection of human dignity mandated by human rights can always also inform the operation of the laws of war. Of particularly transcending, if not disturbing, interest is the fact that the protection of human dignity within the jurisdiction of the State may factor into the calculation of proportionality when dealing with foreign civilians in international armed conflicts.²⁵⁸ Human rights would in this case normalize, under the heading of "human dignity", the process by which the cost of "force protection" is externalized onto the enemy civilian population. In other words, we would see human rights provide a legal-ideological justification for tipping the balance of

256. ICCPR, *supra* note 216, at art. 20:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

257. There exists enthusiasm for translating the substantivist vision of sovereignty (see *supra* note 255) into a legitimating ground for military action. *E.g.*, Fernando R. Tesón, *Ending Tyranny in Iraq*, 19.2 ETHICS & INT'L AFF., Summer 2005, at 1, 1-20 (2005); William Burke-White & Anne-Marie Slaughter, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1 (2002); or Lee Feinstein & Anne-Marie Slaughter, *The Duty to Prevent*, 83 FOREIGN AFF. 136 (2004), among many others.

258. Again, one can profitably refer to the arguments developed in Benvenisti, *Human Dignity*, *supra* note 238.

proportionality “in favor” of minimizing military casualties, and therefore, if necessary, “against” minimizing civilian casualties and destruction.²⁵⁹ And the logic should also be extended to the case of civil wars, for the relationship between the State, its own agents, and the insurgent side, and including the “civilian” population caught in the middle.

The foregoing does not imply denying across the board that these two bodies of law have things in common and have influenced each other in the past sixty years. What matters is however that their respective logic remains separate as long as one considers that they are indeed distinct bodies of rules and have not merged as of yet. Sometimes the implications of the operationalization of these two bodies of rules puts them at odds with one another, simply because of the distinctive facet of sovereign power that they address. As a matter of fact, one could also suggest that human rights and humanitarian law share “something” with international refugee law, yet the latter will also remain a distinct body of rules for very fundamental reasons having to do with the system in which these rules can occur in the first place.²⁶⁰ Discursive adventures in the confusion of genres and discourses, for whichever purpose one may favor, are perfectly acceptable. Yet positions favoring one fashion or another of merger between human rights and humanitarian law should be then accompanied by the awareness of the political and otherwise normative underpinnings and possible consequences of one’s position.

The foregoing serves in the end to reinforce a view on humanitarian law’s relationship to human rights that is otherwise a very classic position, at least from the perspective of humanitarian law. The suggestion is that they are animated by different principles and that their overlap is more than a technical question. Now, to switch perspectives, I turn to the practical encounter of human rights with war, in which human rights has to deal with the existence of humanitarian law. The encounter in judicial terms confirms the centrality of sovereignty in the construction of war, through the meeting point of human rights’ own reliance on sovereignty with war as a public

259. See Thomas W. Smith, *Protecting Civilians...or Soldiers? Humanitarian Law and the Economy of Risk in Iraq*, 9 INT’L STUD. PERSP. 144 (2008) (providing an illustrative and interesting discussion on the possibly disruptive place of “force protection” in the logic of humanitarian law).

260. A good discussion of practical issues raised by the distinct character of refugee law from the perspective of human rights can be found in Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133 (2002). A particular re-reading of refugee law as informed by human rights is defended by James Hathaway. See James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113 (1991), and Daniel Warner & James Hathaway, *Refugee Law and Human Rights: Warner and Hathaway in Debate*, 5 J. REFUGEE STUD. 162 (1992). Although, as noted by B.S. Chimni, the same trends of merger and acquisition seem to have been happening to that relationship, at least rhetorically, as have been supposedly affecting human rights’ relationship to humanitarian law. See B. S. Chimni, *Globalization, Humanitarianism and the Erosion of Refugee Protection*, 13 J. REFUGEE STUD. 243 (2000).

phenomenon. That encounter brings into technical focus the central expression of the difference between them, understood as rooted in their separate approach to the regulation of sovereign coercion. The new element in sight is the issue of jurisdiction, both in terms of the limits to the State's exercise of legitimate power and in terms of the possible authority that can discriminate between application of human rights and application of humanitarian law in practical terms.

II. A QUESTION OF JURISDICTION

The courtship of war by human rights has been occurring for some time already, despite the young age of human rights law. The dealings of human rights institutions, and particularly courts and associated bodies, with questions of war and humanitarian law is instructive in exploring what the relationship of humanitarian law and human rights means when one discusses practically rights, duties, and breaches of obligations. In the foregoing discussion I have insisted on the fact that the difference between the two bodies of law should be maintained for structural reasons, even if one decides that the distinction then in practical terms should be overcome in one way or another. In particular, what comes out of the discussion is that human rights law does not and should not relate to war in the same way as humanitarian law, even though it appears that human rights will relate to humanitarian law for the purpose of delimiting the border of war. In the pages below I want to examine some of the most important case-law dealing with that issue, for two specific reasons.

The first reason is that the "*lex specialis*" slogan has been used and abused as the ultimate expression of the relationship between them in practice. What it means at a deeper structural level, against the picture given above, is however unclear, especially if one takes seriously the relationship between humanitarian law and human rights as a relationship of opposition between distinction and non-discrimination as they relate to the exercise of legitimate State violence. The second reason for this exercise is that the wielding of legal arguments relating to war, especially in the contrast between courts of general jurisdiction like the International Court of Justice on the one hand, and specialized courts like the regional human rights institutions on the other hand, offers the opportunity of witnessing the constraints of legal argument over a quintessentially political discourse such as war. In that examination, I seek also to capture the importance of intertwining legal systems for the purpose of defining what war is, and showing how war is essentially constructed by law, in ways that make Rousseau's vision of war technically visible. Human rights case law confirms quite naturally the unconscious attachment to a social contract-based vision of war, even when it seems to ignore the actual occurrence of war or even appears to condone it.

A. *Lex Specialis* in the World: The ICJ's Position

At the universal level, the now notorious position adopted by the International Court of Justice (“ICJ” or “Court”) is that humanitarian law relates to human rights law as the *lex specialis* to the *lex generalis*.²⁶¹ That general articulation of the relationship, derived from the general law of treaties, has been examined by the United Nations International Law Commission as the overall method for a discussion of relations among legal regimes under the heading of the “fragmentation of international law.”²⁶² As noted in the report prepared by Martti Koskenniemi for the International Law Commission, the meaning of *lex specialis* is not transparent.²⁶³ The use of the formula suggests two possible views on what it actually means or commands:²⁶⁴ either human rights law yields to humanitarian law *in toto* when humanitarian law is applicable *ratione materiae*; or else the specifically relevant norms of human rights law yield to somehow corresponding norms of international humanitarian law when the latter is materially applicable and to the extent that human rights law and the laws of war appear to be in conflict.²⁶⁵ In line with what one would do in applying rules concerning the interpretation of conflicting treaties or treaty rules,²⁶⁶ the ICJ chose the second reading. The Court’s conviction, otherwise shared by specialized human rights institutions, is that human rights do not as such cease their operation in times of armed conflict. As a result, the “*lex*” that we are considering in juggling with the general and special “*leges*” is not a given body of rules with its own worldview, but rather a specific rule in conflict with another rule, detached from its normative context. This detachment of rules from their systemic home is what allows for a dispassionate technical and apolitical management of legal argument when facing war. That is how concealing the ideological implications of each regime’s “structural bias” becomes part of technocratic legal argument.

From a technical perspective, the most important consequences of resorting to the *lex specialis* trope from the perspective of the ICJ, not only as a judicial body but more precisely a judicial body of general international jurisdiction, are the following. First, the theoretical applicability of human rights rules to occupied territories in international armed conflicts is made

261. *Nuclear Weapons Legality*, 1996 I.C.J. 226, ¶ 25.

262. *See* Fragmentation of International Law, *supra* note 2.

263. *Id.* ¶¶ 56–67.

264. The report suggests distinguishing two general uses of the *lex specialis*, one in cases where two rules conflict, and another in which one rule is more specialized than the general one but does not contradict it. *See id.* ¶¶ 56–57, 88–107. Here I follow a narrower notion, against the systemic backdrop presented above, which seeks to highlight the question of whether regimes or else rules within regimes are deemed to be in conflict.

265. *Palestinian Wall*, 2004 I.C.J. 136, ¶ 106.

266. Vienna Convention, *supra* note 46, at art. 53. *See also* Fragmentation of International Law, *supra* note 2, ¶¶ 251–266.

unremarkable.²⁶⁷ And, second, human rights rules (as generalized from the specific example of the right to life) are only applicable to the extent that they conform to the rights and duties provided by the *lex specialis*, *i.e.* humanitarian law (in this case combatant immunity from prosecution for lawful killing, and the corollary of acceptable intentional killing by the State).²⁶⁸ The application of human rights law to situations of occupation has been found also by others to be based on the notion that occupation is a functional equivalent of sovereignty, amounting to *de facto* jurisdiction.²⁶⁹ That idea, accepted by the ICJ, triggers thus the operation of human rights standards in times and concrete situations of war, *i.e.* in times where humanitarian law is applicable materially.²⁷⁰ The application of human rights standards in situations of occupation should however logically, from that standpoint at least, not conflict with rules of humanitarian law.²⁷¹

Based on the more systemic account given above of the political dynamic at work in both human rights law and humanitarian law, the notion that the point of contact between the two regimes is the space of occupation is not surprising. The operation of human rights targets the government of people, while humanitarian law governs in this case occupation (as a result of armed conflict), which is a temporary, yet total, replacement of the sovereign's authority over people and territory.²⁷² The International Court of Justice adopted this view and confirmed that human rights law is applicable

267. See, *e.g.*, *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 178 (Dec. 19), available at <http://www.icj-cij.org/docket/files/116/10455.pdf> (providing a relevant example of the unremarkable manner in which the I.C.J. treats the applicability of human rights rules in occupied territories).

268. *Nuclear Weapons Legality*, 1996 I.C.J. at 240.

269. An interesting discussion, and ultimately skeptical account, of the application of human rights standards to situations of occupation from the domestic perspective is offered by the House of Lords in *Al-Skeini v. Secretary of State for Defence*, [2007] UKHL 26. A critique of the decision, relating to the fear of the consequences of exporting human rights into non *de jure* jurisdictional zones, is provided by Ralph Wilde, *Complementing Occupation Law? Selective Judicial Treatment of the Suitability of Human Rights Norms*, 42 *ISR. L. REV.* 80 (2009).

270. *Palestinian Wall*, 2004 I.C.J. 136, ¶ 109. See also *Loizidou v. Turkey*, App. No. 15318/89, Merits, Judgment, Eur. Ct. H.R. ¶ 56 (1996), available at <http://cmiskp.echr.coe.int/>.

271. It should be repeated, even though it is not really crucial in this particular context, that the scope of application of humanitarian law is not limited to situations of armed conflict, but extends also to peacetime issues (such as the dissemination the Conventions, or the regulation of the uses of the Emblem), which are however directly related to the fact that humanitarian law needs to be actually applicable in times of armed conflict. This means that humanitarian law is formally applicable in times of "peace," *i.e.* beyond the duration of the hostilities *stricto sensu*. See, *e.g.*, *Tadić*, Decision on Defence Motion, Case No. IT-94-1, ¶ 67. As far as the Geneva Conventions are concerned, critical examples are of course provisions relating to prisoners of war after the end of hostilities (*e.g.*, GCIII, *supra* note 24, at art. 5, 119) and implementation or enforcement of treaties (*e.g.*, GCIV, *supra* note 24, art. 146).

272. HCIV, *supra* note 120, arts. 42, 43.

to “acts done by a State in the exercise of its jurisdiction outside of its territory,” as exemplified by situations of occupation.²⁷³ More specifically, Articles 42 and 43 of the Hague Regulations of 1907 define who the Occupying Power and what occupation essentially is in terms of a temporary but complete substitution of controlling authorities over a territory, which carries the obligation of enforcing law and order on the occupied territory in the absence of the sovereign. For the Court, this “obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.”²⁷⁴

The expression “exercise of its jurisdiction,” used by the Court as a general description of the State’s exercise of power, is ambiguous when taken outside of context, given that it thus flattens the difference between jurisdiction based on sovereignty, on the one hand, and temporary exercise of power based on other reasons, be it a legally expressed international agreement or extra-legal unilateral deployment of State power. On a formal level, humanitarian law and human rights law have in common, from the ICJ’s perspective, the fact of being bodies of international legal rules necessarily based in one way or another on sovereignty. But in a more substantive way, one should remember that the mode or facet of sovereignty regulated by each body of norms is distinct, which explains the generally different shape of their respective norms, but also the resulting different shape of the monitoring or enforcement mechanisms, and the fact that these mechanisms do not generally coincide.²⁷⁵ The ICJ, however, has hypothetically general jurisdiction over international law and all of its discreet parts, on the basis of them being all primary rules of international law subjected to the same secondary rules (such as the sources of law, that determine whether the rules are hand are really “law”, or the rules of international responsibility, which determine what happens if rules of international law are breached.) In the case of the two advisory opinions in which the *lex specialis* policy is suggested, the ICJ exercises interpretive jurisdiction over all of international law, by virtue of its material jurisdiction not being bound at all by the consent of States.²⁷⁶ But the perspective of

273. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 204, ¶ 70 (Dec. 19).

274. *Id.* ¶ 178.

275. The lack of complete overlap, despite contextual coincidence, is the reason why “human rights” as a special regime, or “self-contained regime”, is a recurring example in the report of the International Law Commission’s Working Group on the Fragmentation of International Law. See generally Fragmentation of International Law, *supra* note 2. See also, Martti Koskeniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553 (2002).

276. *Palestinian Wall*, 2004 I.C.J. 136, ¶ 46 (rejecting in particular the notion that the Court should not exercise jurisdiction in the case at hand for the reason that the underlying

institutions designed for the implementation of one of those bodies of law is not the same, given that in the case of those institutions there is a jurisdictional limit to the possibility of such an encounter between different types of rules, while that limit does not exist *a priori* for a court of general jurisdiction. Moreover, the perspective on the encounter will be shaped by the substantive mission of the institution. The era of fragmentation has been exemplified most notoriously by the visibility of a bitter dialogue between the ICTY and the ICJ around the proper interpretation of international law across sub-disciplinary borders, in relation to issues of responsibility in cases of violations of humanitarian law.²⁷⁷ Of importance is that the ICJ here asserts its unique access to general international law, while insisting on the specialized perspective of international criminal law, *i.e.* the limited functional perception of international law by a specialized organ like the ICTY.²⁷⁸ What comes out of the exchange for the purpose of the relationship

contentious case is beyond the consent-based jurisdiction of the International Court of Justice).

277. As is generally known by now, the inter-institutional dialogue had to do with the proper “control” test to be used in assessing whether an individual can be legally considered to be a *de facto* agent of a State. Military and Paramilitary Activities in and against Nicaragua, (Nicar. v. U.S.), 1986 I.C.J. at Judgment 14, 115 (June 27). The exchange starts with the classic formulation of the “effective control” test in the context of the relationship between the United States and counter-revolutionary guerrillas in Central America. *Id.* Then comes the rejection of the “effective control” test by the ICTY in deciding who was an agent of the State in context of the wars in former-Yugoslavia, in Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 112 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999). And the last step comes in the shape of the ICJ’s reassertion of its *Nicaragua* test, and rebuking of the ICTY for its inept incursions into the world of general international law, in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Merits, Judgment 2007 I.C.J. 91, ¶ 402 (Feb. 26).

278. *Id.* ¶ 403:

The Court has given careful consideration to the Appeals Chamber’s reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber’s view. First, the Court observes that the ICTY was not called upon in the Tadić case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

between human rights law and humanitarian law, considered in our present context to be respectively the *lex generalis* and the *lex specialis*, are the following. The institutional organs of the *lex generalis*, in our case human rights law, have a perspective that is based on the *lex generalis* itself, which does not solve its own relationship to the *lex specialis*. Those organs, from the perspective of international law, are specialized organs in the sense of being jurisdictionally limited to one area of substantive international law. Their relationship to even general international law (like the law of treaties and the law of State responsibility) will be mediated by that limitation—as the ICTY–ICJ dialogue demonstrates in practice.

More generally, war–situations have given rise, because of the available institutional fragmentation in international law, to multi–jurisdictional litigation processes.²⁷⁹ In each fragment of the litigation process the “war” in question is by necessity re–described according to the particular dynamic of the law being applied, and according to the institutional setting in which it was applied. Unsurprisingly, even from the intra–disciplinary perspective of law, there is potentially a variety of legal perspectives on war. Those need not be compatible, since after all, from the perspective of the *lex specialis* of humanitarian law question itself, human rights is necessarily another *lex specialis*. Against the background presented above, which gives meaning to the notion that human rights and humanitarian law are separate fragments of the same whole, now we can envisage the encounter of human rights with humanitarian law on the basis of what human rights and humanitarian law have in common, but also what they do not have in common.

The three regional human rights systems have had different encounters with war, and as part of those encounters have had the opportunity of saying a few things about the relationship between human rights and humanitarian law in institutional and substantive terms. A close examination of those encounters will say three things. First, there is a jurisdictional difference between the two bodies of law, which expresses in formal terms the fact that they are interested in different aspects of sovereignty, where sovereignty is

279. The NATO operation in Belgrade in March of 1999 gave rise to a few international legal proceedings. Before the International Court of Justice it took the shape of the FRY suing member States of NATO, yielding the ICJ decision on Legality of Use of Force (Serb. & Mont. v. Belg.), (Serb. & Mont. v. Can.), (Serb. & Mont. v. Fr.), (Serb. & Mont. v. F.R.G.), (Serb. & Mont. v. Italy), (Serb. & Mont. v. Neth.), (Serb. & Mont. v. Port.), and (Serb. & Mont. v. U.K.), Preliminary Objections, 2004/3 I.C.J. 1 (Dec. 15). Before the European Court of Human Rights, the Kosovo campaign took the shape of the case of *Bankovic v. Belgium*, 2001–XII Eur. Ct. H.R. 333. And before the International Criminal Tribunal for former-Yugoslavia, the NATO bombing gave rise to a review process on the possibility for the ICTY Prosecution to start proceedings against State members of NATO. See FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA (2000), reprinted in 39 I.L.M. 1257, 1257–83 (2000).

legally speaking exclusive (territorial) jurisdiction.²⁸⁰ From the jurisdictional perspective of human rights, humanitarian law as such is never met, because human rights law never meets “war,” be it civil or international, as a relevantly distinct state of affairs. Second, human rights’ ignorance of war is an assertion of material (subject matter) jurisdiction and, following what was said above about human rights law in general, is a political gesture. As a political gesture, the reaching out of human rights jurisdiction into a domain that is otherwise considered sufficiently special to have its *lex specialis*, needs to be debated but should not be seen as a set of simply “technical” questions. In other words, the political meaning of fragmenting sovereignty into different areas of regulation must be recovered, behind the seemingly formal notion of jurisdiction. Third, case law across the three regional human rights systems is not homogeneous. Yet the only system that has taken heed of the political foundations of human rights is the African Human Rights system. As will be shown below, the African Commission’s facing up to the intimate abhorrence of human rights for war is an antidote in particular to the European Court’s own take so far, which displays a lack of explicit awareness in relation to the political nature of jurisdiction, and a resulting incoherent attitude towards jurisdiction itself. We begin, however, with the Inter-American system’s very clear exposition of the question of jurisdiction as a background.

B. *Lex Generalis* and War in the Americas: Ambivalence

1. *The Court: Jurisdictional Orthodoxy*

The Inter-American Court stated its position in fairly clear terms in the case of *Las Palmeras*, while lecturing the Inter-American Commission on how to deal with the legal analysis of war-time claims:

280. Sovereignty is legally speaking exclusive and absolute jurisdiction. According to the celebrated formulas used by Judge Max Huber, “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.” *Island of Palmas Arbitration (U.S. v. Neth.)*, 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928). The translation of the political notion of sovereignty into the legal image of absolute and exclusive competence is especially well expressed from a non-legal, sociological perspective concerned with the effects of conflict on the State entity if one considers it seriously as a jurisdictional space. See Jieli Li, *State Fragmentation: Toward a Theoretical Understanding of the Territorial Power of the State*, 20 SOC. THEORY 139, 141 (2002). If sovereignty concerns the way in which exclusive jurisdiction is exercised over respective territories of an empire or a nation-state, then the power of a sovereign state is more than the authority of bureaucratic administration; it hinges on territorial integrity. By viewing the state in terms of territorial integrity, attention is drawn to the extreme uncertainties of territorial boundaries in constant interstate conflict. One considers then not only how the incumbent government could survive politically, but more importantly, how statehood being viewed as the quality of both a physical and a legal entity could be preserved.

The Court is . . . 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. In this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibility. In order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of the provisions of the Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention. The latter 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.²⁸¹

The Inter-American Court, while making clear that it does not have jurisdiction over humanitarian law claims in the sense of not having formal jurisdiction over humanitarian law treaties such as the Geneva Conventions (and implying that neither does the Commission possess such jurisdiction), concurs with the Commission in considering that humanitarian law is however relevant to the interpretation of human rights standards. Whether that is done along the lines of the interpretive rule of *lex specialis* is unclear. The position is simply that the Court considers international humanitarian law as factual data, which as any other relevant fact may be useful in interpreting the applicable law.²⁸²

What the Court means as the final position on the matter within the Inter-American system becomes clearer in its broader jurisprudential context. The Court's moderately stern jurisprudential position is, first of all, set against the more adventurous stance of the Commission. In a more teleological perspective, the Commission suggested that the Geneva Conventions and the American Convention "*share a common nucleus of non-derogable rights and a common purpose of protecting human life and*

281. Las Palmeras Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 33 (Feb. 4, 2000).

282. Along the same lines, in considering in a different context how to apply the right to freedom of movement to the situation of displaced communities, the Court noted:

Of particular relevance to the present case, the UN Secretary General's Special Representative on Internally Displaced Persons issued Guiding Principles in 1998, which are based upon existing international humanitarian law and human rights standards. The Court considers that many of these guidelines illuminate the reach and content of Article 22 of the Convention in the context of forced displacement.

Moiwana Village v. Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2006)

dignity.”²⁸³ The Commission reiterated its understanding of a normative convergence between the two regimes in the context of the Guantánamo detention facilities, and more particularly the legal situation of their inmates, concerning whom the Inter-American Commission issued precautionary measures initially in 2002.²⁸⁴ The United States government, following a strict separationist position which had been deployed also against other human rights bodies who had attempted to deal with the Guantánamo issue,²⁸⁵ suggested that the question was one of humanitarian law, and therefore beyond the jurisdictional reach of the Commission.²⁸⁶ In the course of multiple reiterations of its mandated interim measures, the Commission decided to propose its own understanding of the general relation that the two bodies entertain with one another, as an alternative to both the United States’ position and also what we have seen to be the final position of the Court. Given the specificity of the position, it is worth quoting at length:

[T]he Commission has drawn upon certain basic principles that inform the interrelationship between international human rights and humanitarian law. It is well-recognized that international human rights law applies at all times, in peacetime and in situations of armed conflict. In contrast, international humanitarian law generally does not apply in peacetime and its principal purpose is to place restraints on the conduct of warfare in order to limit or contain the damaging effects of hostilities and to protect the victims of armed conflict, including civilians and combatants who have laid down their arms or have been placed hors de combat. Further, in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity. In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictates

283. *Juan Carlos Abella*, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 158 (emphasis added). *See also Coard*, *supra* note 61, at ¶ 39.

284. Inter-American Comm’n H.R., *Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures*, (March 12, 2002) [hereinafter *Request for Precautionary Measures*], *excerpted in* 41 I.L.M. 532 (2002).

285. *See* U.N. Comm. Against Torture, 36th Sess., 703d mtg. at 4, U.N. Doc. CAT/C/SR.703, (May, 12 2006) (stating that in the presentation of its second periodic report on the implementation of the convention against torture, the government of the United States, before engaging in a detailed discussion of the question of individuals captured in the course of the “War on Terror,” mentioned that the issue was governed by the “laws of war” and therefore beyond the scope of the Convention and beyond the jurisdiction of the Committee).

286. *Response of the United States to Request for Precautionary Measures – Detainees in Guantánamo Bay, Cuba*, *reprinted in* 41 I.L.M. 1015 (2002).

that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*.²⁸⁷

This argumentative line, which the Commission incidentally justifies as supported by “*the jurisprudence of the Commission*,” is more expansive than that of the Court. The latter motivated its own conclusion on the jurisdictional notion that, as an organ established by the American Convention, it does not have the power to interpret norms of humanitarian law *qua* norms (and neither does the Commission, as far as the Court can tell). The discrepancy between the two—which is understandable given that the Inter-American Commission is not a judicial body and seemingly enjoys a greater leeway for the purpose of its promotional and advocacy functions²⁸⁸—is highlighted by the pre-*Palmeras* cases that the Commission refers to under the heading of “the jurisprudence of the Commission.”

2. *The Commission: Creative Heterodoxy*

Of particular interest in this context is the *Abella* case. In it, the Commission follows a decidedly purposive and teleological interpretation of the legal bases for its power to use humanitarian law alongside human rights law, and unpacks in detail what appears only superficially in the Guantánamo orders on provisional measures. Of importance here are the clarifications that it brings on the issue of sovereignty and State jurisdiction, given the jurisdictional stance taken by the Court in *Las Palmeras*. The central passage in which the Commission discusses the issue of applying humanitarian law says the following:

Though it is true that every legal instrument specifies its own field of application, it cannot be denied that the general rules contained in international instruments relating to human rights apply to non-international armed conflicts as well as the more specific rules of humanitarian law. For example, both Common Article 3 and Article 4 of the American Convention protect the right to life and, thus, prohibit, *inter alia*, summary executions in all circumstances. Claims alleging arbitrary deprivations of the right to life attributable to State agents are clearly within the Commission’s jurisdiction. But the Commission’s ability to resolve claimed violations of this non-derogable right arising out of an

287. Request for Precautionary Measures, Inter-American Commission of Human Rights, *supra* note 284, at 532–33. See also Inter-American Comm’n H.R., Pertinent Parts of July 23, 2002 Reiteration of Precautionary Measures Regarding Detainees in Guantánamo Bay, Cuba, *reprinted in* 45 I.L.M. 667 (2006).

288. See generally Control de legalidad en el ejercicio de las atribuciones de la Comisión Interamericana de Derechos Humanos (arts. 41 y 44 a 51 de la Convención Americana sobre Derechos Humanos), Opinión consultiva, OC-19/05, Inter-Am. Ct. H.R. (ser. A) No. 19 (Nov. 28, 2005), available at <http://www.corteidh.or.cr/opiniones.cfm?idOpinion=25>.

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.²⁸⁹

To supplement this, the Commission displays, as always, great legal ingenuity. By virtue, it says, of obligations under the Geneva Conventions, and particularly common Articles 1 and 3, States have a duty to respect (and ensure respect of) those instruments and otherwise implement them as part of their domestic law. Once this is done, Article 25 of the American Convention, which provides that an individual under the State's jurisdiction has a right "*to a competent court or tribunal for protection against acts that violate his [sic] fundamental rights recognized by the constitution or laws of the state concerned or by this Convention,*" provides a basis for the Commission to assess how humanitarian law is violated *via* the violation of domestic law.²⁹⁰ And the Commission does not stop at one creative step, but proceeds further.

The Commission turns first to Article 29 (b) of the American Convention,²⁹¹ which prohibits, as other human rights treaties do,²⁹² (mis)using the legal instrument for the purpose of "*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*

289. Juan Carlos Abella, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 160–161.

290. *Id.* ¶¶ 161–162 (emphasis added).

291. *Id.* ¶ 164.

292. *E.g.*, ICCPR, *supra* note 216, at art. 22(3) (relating the issue of abuse of rights to the exercise of freedom of association, and specifying that nothing in the Convention should be used to diminish responsibilities of State Parties under ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organize Convention, *opened for signature* July 9, 1948, 68 U.N.T.S. 17 (entered into force July 4, 1950))). More generally, Article 23(b) of CEDAW declares that nothing in the text of the treaty should be interpreted as affecting other international legal obligations that are more conducive to the advancement of the elimination of gender discrimination. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 204, at art. 23(b).

states is a party."²⁹³ The result of that provision, as far as humanitarian law is concerned, would then be that:

where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question. If that higher standard is a rule of humanitarian law, the Commission should apply it.²⁹⁴

Then the Commission turns to Article 27 of the Convention, relating to derogations, and particularly the limitation clause, which states that suspension of rights by a State should not be "inconsistent with that State's other obligations under international law." The Commission interprets that provision quite candidly in the following terms:

[W]hile it cannot be interpreted as incorporating by reference into the American Convention all of a State's other international legal obligations, Article 27(1) does prevent a State from adopting derogation measures that would violate its other obligations under conventional or customary international law.²⁹⁵

The key moment in this argument highlights also the core of the argument in the Guantánamo context. It consists here in drawing the ambiguous connection between the two parts of that last sentence: the Convention under the Commission's jurisdiction does not include humanitarian law, even if it is relevant, yet at the same time it should not be interpreted, *per* its express provisions, as affecting it if it is relevant. To operationalize that proposition, the Commission refers to Judge and Professor Thomas Buergenthal's commentary on the state of emergency in ICCPR, a text that is all the more contextually relevant since Buergenthal was once President of the Inter-American Court, later a member of the United Nations Human Rights Committee (in charge of monitoring the ICCPR), and still later a judge on the ICJ. Under Article 4 of ICCPR (the equivalent of the cited Article 27(1) of the American text), says the Commentary, a suspension of rights that violates other obligations of the State would constitute a violation both of those obligations and of the Covenant.²⁹⁶ The Commission endorses this statement, based on the parallel wording adopted by ICCPR and the American Convention:

293. American Convention on Human Rights art. 29b, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (emphasis added).

294. *Juan Carlos Abella*, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 165.

295. *Id.* ¶ 168.

296. *Id.* ¶ 169 (referring to Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogation*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 72, 82 (Louis Henkin ed., 1981)).

[W]hen reviewing the legality of derogation measures taken by a State Party to the American Convention by virtue of the existence of an armed conflict to which both the American Convention and humanitarian law treaties apply, the Commission should not resolve this question solely by reference to the text of Article 27 of the American Convention. Rather, it must also determine whether the rights affected by these measures are similarly guaranteed under applicable humanitarian law treaties. If it finds that the rights in question are not subject to suspension under these humanitarian law instruments, the Commission should conclude that these derogation measures are in violation of the State Parties obligations under both the American Convention and the humanitarian law treaties concerned.²⁹⁷

From that vantage point, if we look back at the (later) exchange between the United States government and the Inter-American Commission regarding the Guantánamo situation, the debate boils down to two preliminary legal issues. The first is that in times of war, the *lex specialis* comes into play, and the institution in charge of implementing the *lex generalis* needs to make that practically relevant. That is a substantive issue, a question of what norms apply to what situation, which is what the ICJ presented as solved precisely by the *lex specialis* principle. The second point is, however, that the Commission is a human rights body: it is both created by a human rights treaty and has a delimited jurisdiction *ratione materiae*, constituted by the text of its founding treaty, and the precise competence and functions that States have attributed to the Commission directly. That is not faced at all by the ICJ, because its position is dictated first by its position as a court of theoretically general jurisdiction, and second by the immediate context of an advisory opinion, where it has for all intents and purposes general jurisdiction (*i.e.* it is not limited by the consent of States expressed in jurisdictional limitations, and can “apply,” or at least interpret, any international legal norm that might seem relevant).

In *Abella*, the ingenious argumentative line developed by the Commission is really two-dimensional, as the Commission implicitly tries to deal with those two preliminary issues at the same time. The first line is based on teleological interpretations of humanitarian law treaties and the American Convention.²⁹⁸ The second line is the one that connects humanitarian law to the American Convention, through references by the Convention to the rest of international law. The problem is that these arguments do not, quite paradoxically, answer the jurisdictional question, which generated a fundamental problem for the practical implementation of the *lex specialis* idea, given that *lex specialis* is a principle of interest for treaty interpretation by a judge or equivalent institution. The first line

297. *Id.* ¶ 170.

298. The Commission follows the same type of interpretive line in *Coard*, *supra* note 61, at ¶ 39.

establishes a substantive relationship between human rights and humanitarian law, with which one can agree or disagree. On the basis of what was said above, and with the considerable amount of respect due to the Commission, I would personally disagree with it, most of all on the basis of its political implications. In any event, the second argumentative line adopted by the Commission boils down to saying that humanitarian law may bind the State as part of the body of international rules outside of the Convention, and to which the Convention refers in Articles 27 and 29. That a violation of international law in the terms posited by Thomas Buergenthal would actually also constitute a violation of the Convention is plausibly as undeniable as the Commission makes it sound. Yet this does not mean that the Commission has jurisdiction to decide that such violation has occurred. *Prima facie*, in very positivistic terms, a striking issue of discrepancy between procedure and substance appears, as had appeared significantly several times before the ICJ. That there is a violation of international law does not mean that we can say that there is a violation of international law; that is the result of consensual jurisdiction as the basis for all institutional activity in the inter-State system.²⁹⁹ Here the notion is that it may well be a violation of humanitarian law, or for that matter it may well be a violation of anything else in international or domestic law. But the Commission may not be entitled to say that it is. The first argumentative line is there seemingly to by-pass the substance/procedure divide, by proposing that in the end human rights (which are within the Commission's jurisdiction) and humanitarian law (which is not) have the same objective, so that presumably we can treat them in the same way from the perspective of the Commission's institutional mission. The Court did not buy that confusion of genres.

The *Palmeras* case quoted at the beginning of this discussion would seem therefore to align the Inter-American approach on the general jurisprudential view of the ICJ, within which we could assume that the *lex specialis* statement would not lead to a derogation of the substance/procedure or merits/jurisdiction distinction. In other words, as the Court mentioned it, the Inter-American human rights organs are not legally justified in interpreting humanitarian law *qua* law in the same way as they do interpret the American Convention. That does not contradict the notion that humanitarian law is a *lex specialis* to the *lex generalis* of human rights. The technical issue of jurisdiction, however, which was obscured by the ICJ's ethereal position, draws attention to sovereignty and sovereign consent. Disregarding the issue of material jurisdiction means disregarding the importance of the sovereign border for a differentiation between war and any kind of violence, including crime or State brutality. Blurring the process/substance in the implementation of international law is

299. For a classic example, see *East Timor Case*, 1995 I.C.J. 90. See also *Fisheries Jurisdiction Case (Spain v. Can.)*, Jurisdiction, 1998 I.C.J. 432 (Dec. 4).

unsurprisingly connected to a weakening of the position of formal sovereignty as a spatial and political reference. Supporting justification for the leap is here found in normative proximity (created for instance by the fact that implementation of a convention can be imagined to result in a weakening of other relevant provisions), which seems to be a formal relationship, but rests rather on the fundamental assumptions that bodies of rules can conflict because they talk about the same thing, but should however not conflict, because they have the same objective.

3. Clarifying *Lex Specialis*: The Guantánamo Exchange

If one tries to recapitulate, two important points are raised in the exchange between the United States government and the Inter-American Commission in the context of the Guantánamo situation. The first point is that everyone and their neighbor now relies on the ICJ's "*lex specialis*" dictum, from the Commission to the Court to the (defendant) State(s). Yet each one of them seems to have their own understanding of what the meaning of "*lex specialis*" is and what the principle really mandates in terms of the enforcement of special, or would-be self-contained, international legal regimes. The divergence of views was rehearsed at each juncture where a human rights body would meet "war" in the form of the Guantánamo Bay detention facilities. It occurred most visibly first in the United States' exchange with the United Nations Committee Against Torture,³⁰⁰ and then in even sharper contrast in its dialogue with the Human

300. See U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention Against Torture: United States of America ¶ 14, U.N. Doc. CAT/C/USA/CO/2 (2006), where the Committee refers to the United States' *lex specialis* argument in these terms:

The Committee regrets the State party's opinion that the Convention is not applicable in times and in the context of armed conflict, on the basis of the argument that the "law of armed conflict" is the exclusive *lex specialis* applicable, and that the Convention's application "would result in an overlap of the different treaties which would undermine the objective of eradicating torture.

The summary record manifests then the plasticity of the *lex specialis* method in the best possible fashion when it concludes that:

[t]he discussions with the United States delegation on the question of *lex specialis* had been noteworthy. While he recognized that that principle might be used in determining the primacy of one convention over another, public opinion expected the application of rules which provided greater protection to defenceless individuals, who should enjoy the presumption of innocence.

U.N. Comm. Against Torture, U.N. CAT, 36th Sess., 703 mtg. at 18, U.N. Doc. CAT/C/SR.703 (May 12, 2006).

Rights Committee.³⁰¹ In those exchanges, as in the dialogue with the Inter-American Commission, nobody contradicts the ICJ, including the United States Government. To the above mentioned statement by the Inter-American Commission on the fact that human rights keep applying to the Guantánamo captives (whether there is a war or there is none), the government of the United States responds (and this is quite significant given the United States Government's supposedly tense relationship with the ICJ in general since the *Nicaragua* days) that the Commission has failed to follow the "methodology" developed by the ICJ for dealing with the relationship between the two bodies of law.³⁰² That failure is, incidentally, only an addition to the primary fact that the Commission had manifestly acted beyond its jurisdiction.³⁰³ In other words, the United States' second line of legal defenses consists in telling the Commission exactly what the Human Rights Committee later told the United States Government: it is indeed a question of *lex specialis*, but you don't understand what applying the *lex specialis* method means.

A second point that is highlighted in the exchange between the United States and the Commission is that, beyond the fact that there is disagreement on the actual contents of the *lex specialis* interpretive maxim, there is visibly a split between substance and procedure within the question of the *lex specialis*. As a matter of fact, the first line of lawyerly defense

301. The position of the United States on the *lex specialis* issue was expressed in the following simple terms:

The United States is engaged in an armed conflict with al Qaida, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the Covenant, is the applicable legal framework governing these detentions.

U.S. DEP'T OF STATE, U.S. GOVERNMENT'S ONE-YEAR FOLLOW-UP REPORT TO THE [HUMAN RIGHTS] COMMITTEE'S CONCLUSIONS & RECOMMENDATIONS 2 (2007), available at <http://2001-2009.state.gov/documents/organization/100845.pdf>. The position of the Human Rights Committee was that the United States did not understand the ICJ's decision and should therefore revise its position on the relationship between the Covenant and the laws of war. Based on its concern about "the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of . . . its position that the Covenant does not apply . . . in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice[.]" it recommended therefore that the United States "should in particular . . . acknowledge the applicability of the Covenant . . . in time of war." Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United States of America, 87th sess., July 10–28, 2006, ¶ 10, U.N. Doc CCPR/C/USA/CO/3/Rev.1 (emphasis added).

302. Response of the U.S. to Request for Precautionary Measures, *supra* note 286, at 1019.

303. *Id.* at 1020.

was to say that, even if there is a way in which human rights is a *lex generalis* to the *lex specialis* of the laws of war (and regardless why it would be so), the issue of jurisdiction is not solved by that interpretive maxim. Simply stated, no human rights body has jurisdiction over the *lex specialis* just because they have jurisdiction over the supposed *lex generalis*. After all, one could say that international refugee law is also a *lex specialis* to human rights law, but in this case too there is a host of issues, both institutional and substantive, that are raised by the peculiar relationship between the two bodies of law, and that are not clarified in any way by the mere mention of the *lex generalis/lex specialis* principle.³⁰⁴ The ICJ, who started the whole *lex specialis* mania out of an otherwise innocuous maxim on the interpretation and application of contrary treaty norms, is a court of (theoretically) general jurisdiction, which is exactly what human rights bodies are not.³⁰⁵ And so, when the United States Government says that the

304. Although it would be going too much into the details of the question by pursuing the example here, it is worth noting that technically speaking, the relationship between human rights on the one hand, and refugee law and humanitarian law on the other hand, has been rendered more legally visible by the Convention on Rights of the Child, *supra* note 41, art. 38, ¶ 2 (referring to humanitarian law and “child refugees” in ¶ 38 and to “other international human rights or humanitarian instruments to which the said States are Parties” in ¶ 22), but not the 1951 Convention on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954); *see* Convention on the Rights of the Child, *supra* note 41. *See also* Warner & Hathaway, *supra* note 260 (discussing the technical relations between human rights law and refugee law).

305. Against this broad statement, one would have to mention a particularly interesting case, which would certainly deserve a more detailed treatment. The example is that of the African Court of Justice and Human Rights, as well as its now unclearly defunct predecessor, the African Court of Human and Peoples’ Rights. Before the creation of the African Court of Justice and Human Rights, the extent of the jurisdiction of its now unclearly defunct predecessor, the African Court of Human and Peoples’ Rights, was delineated as follows: “The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.” This made the African Court the only human rights judicial institution to be able to enforce ICCPR or the UN Convention on the Rights of the Child, or the UN Convention on the Rights of Persons with Disabilities. *See* Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights art. 3, *opened for signature* June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III), *reprinted in* COMPENDIUM OF KEY HUMAN RIGHTS INSTRUMENTS OF THE AFRICAN UNION 33 (Christoph Heyns & Magnus Killander eds., 2007). The statute of the African Court of Justice and Human Rights was the result of the merger of the just mentioned African Court of Human and Peoples’ Rights and the African (Union’s) Court of Justice, the latter having been created by the Art. 5 of the Constitutive Act of the African Union (*see Id.* at 6) and an AU Assembly’s subsequent implementing Decision (Decision on the Draft Protocol of the Court of Justice of the African Union, AU Doc. Assembly/AU/Dec. 25 (II), (July 11 2003.)). *See* Protocol on the Statute of the African Court of Justice and Human Rights, July 1, 2008, <http://www.africanunion.org/root/au/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf>. The new Court’s jurisdiction is set by Article 29 of the Statute in narrower, yet still incomparably broader terms, at least with regard to the Court’s sister regional human rights courts in Europe and the Americas. These specific jurisdictional

relationship between humanitarian law and human rights within the Inter-American system is settled by the *Palmeras* case (a precedent that is then precisely not followed by the Inter-American Commission),³⁰⁶ what it points to is the fact that, whatever way one may choose to look at the *lex specialis* issue, a human rights body cannot enforce the Geneva Conventions or even customary humanitarian law *qua* law, for lack of material jurisdiction. Whether facts of war comes up on the radar screen of human rights is another question, which has been for now implicitly answered in the affirmative, but which will need more examination below. As a result, the notion that humanitarian law may have merged with human rights in any more substantive fashion remains relegated, as far as the Inter-American *lex lata* is concerned, to the domain of individual opinions.³⁰⁷ But otherwise, the discussion has shown that the general notion of humanitarian law as a *lex specialis* to the *lex generalis* of human rights is not immediately obvious from the perspective of bodies in charge of enforcing or monitoring

limits *ratione materiae*, resulting partly from the complicatedly dual nature of that judicial institution (half general and half specialized), are obviously offset by the restricted limitations *ratione personae* and *ratione loci* known also to the other two regional systems. The wording of Article 29 is the following:

- The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to:
- a) the interpretation and application of the Constitutive Act;
 - b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity;
 - c) the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned;
 - d) any question of international law;
 - e) all acts, decisions, regulations and directives of the organs of the Union;
 - f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;
 - g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;
 - h) the nature or extent of the reparation to be made for the breach of an international obligation.

Id. at art. 29.

306. Response of the U.S. to Request for Precautionary Measures, *supra* note 286, at 1019.

307. *Moiwana Village*, Inter-Am. Ct. H.R. (ser. C) No. 124, at ¶ 21 (Cançado, J., separate opinion).

human rights norms, *i.e.*, the *lex generalis* to the *lex specialis* of humanitarian law, but still a *lex specialis* to the *lex generalis* of international law. Managing the concurrent material scope of application of humanitarian and human rights law does not solve the problem. Sovereign jurisdiction does. The politics of the jurisdictional issue comes forward in clearer form in the European jurisdictional context.

C. *Lex Generalis* and War in Europe: Repression

In the handful of cases within the corpus of European human rights jurisprudence in which humanitarian law or war were either mentioned or implied, the European Court has had the opportunity of facing very plainly the difference between concurrent applicability and jurisdiction. The specificity of the European Court's position, in relationship to its American counterpart, is its management of the jurisdictional issue posed by war-contexts in the form of a repression of both war and humanitarian law. They both appear as a non-issue, in massive contrast with the juggling exercise and academic engagement performed by the American institutions. The Court managed notoriously to deal with claims arising from the situation in Chechnya in the 1990s and early 2000s without referring in its reasoning to humanitarian law or war, aside from reporting that the claimants had done so in their claims,³⁰⁸ or that other institutions had reported on the situation in terms of humanitarian law violations,³⁰⁹ and without seemingly paying any attention to the otherwise meaningful question of whether there actually was an "armed conflict" or not. The background instance here, the equivalent of the *Las Palmeras* opinion, comes in the following statement by the European Court:

Article 2 [*i.e.*, the right to life] 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

308. *Isayeva v. Russia, Yusupova v. Russia, Bazayeva v. Russia*, App Nos. 57497/00, 57948/00, 57949/00 Eur. Ct. H.R., ¶¶ 102, 157, (February 24, 2005), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Isayeva&sessionId=66101579&skin=hudoc-en> (2005).

309. *Musayev v. Russia, Labazadova v. Russia, Magodanov v. Russia*, App Nos. 57941/00, 58699/00, & 60403/00, Eur. Ct. H.R., ¶ 118 (July 26, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=821526&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

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.³¹⁰

The European Court seemingly takes notice of the "international conflict," humanitarian law, the ICRC, "protected persons," combatants, and so on. In other words, the Court encounters in its own way the principle of distinction, which would open up the possibility, if not the necessity of imposing humanitarian law on the interpretation of "arbitrary" deprivations of life. Dealing then with the notion of people being in the power of the Enemy in times of hostilities, the Chechen situation would come out of the "state of emergency" framework of human rights law, and fall into the situation of an armed conflict. However, the paragraph cited above constitutes the only reference in the decision at hand to humanitarian law or the notion of distinction. More importantly, when it comes to discussing the claims relating to, precisely, the deprivation of the right to life, the Court falls back onto its traditional rhetoric, including that used in all cases relating to the situation in Chechnya, and consisting in finding a violation of the due diligence obligation of investigating deaths occurring under the control of the State.³¹¹

The overall approach of the European Court does not therefore mirror the formalist traditionalism displayed by the Inter-American Court, or the militant creativity of the Inter-American Commission, when it comes to translating *lex specialis* into a workable relation between substance and jurisdiction. What comes out of the European Court in terms of the interpretation of the *lex specialis* idea is the notion that, as the ICJ said, human rights continue in times of war. When jurisdiction is added to the mix, the result is that human rights is blind to humanitarian law, and is therefore blind to war as a specific social phenomenon. The only question is whether there is an "emergency" in formal terms. If there is no such derogation from the normal situation, the underlying conditions will be normal as far as human rights are concerned.

1. Normalizing Chechnya: The Invisibility of War to Human Rights

The line of reasoning in approaching the Chechnya situation does not engage the *lex specialis* question. From the human rights' jurisdictional point of view, humanitarian law is possibly irrelevant for the examination of

310. Varnava v. Turkey, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 & 16073/90, Eur. Ct. H.R. (2009), ¶ 185, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=854079&portal=hbkm&source=externalbydocnumber&tabl>.

311. *Id.* ¶ 194.

a situation otherwise approachable as one of internal armed conflict; and that is so, if the situation in question can otherwise be portrayed as a law enforcement operation, *i.e.* a “regular” exercise of State police power. Here we can see a follow-up from the Inter-American position; the human rights jurisdiction bumps into something that could be a “war” and covered by the “laws of war,” but unlike the Inter-American institutions, the specificity of the encounter is not acknowledged and the material jurisdiction of human rights erases the material jurisdiction of the laws of war.

That some may want to dispute the possibility of discussing the Chechen situation without treating it as something different from a mere police operation, as seen in the fact that NGOs cited by the Court do regard the situation as covered by humanitarian law,³¹² highlights the regularizing effect of human rights law over war-like violence in the life of the State. In terms of the construction by human rights law of authorized State-based lethal violence, one should remember that counter-insurrectional violence is a law enforcement measure for the purpose of the right to life (Article 2), whereas the evaluation of war operations is declared to be outside the scope of human rights by their exclusion from the list of lawful instances of intentional deprivation of life (Article 15).³¹³ Asserting the applicability of human rights would suggest in that very precise sense that there is no “war” where war is associated with the restoration of the nation’s health rather than the daily (if brutal) operation of the sovereign.

In very basic terms, leaving the legal relevance of the existence of an armed conflict un-discussed means before anything else that material jurisdiction is not in question for a court like the European Court. The question is very concretely: should the *lex generalis* ignore the special circumstances that make the *lex specialis* applicable if the application of the *lex specialis* is not possible for jurisdictional reasons? We can see how the looming legal invisibility of war in this context shares something, though not yet fully distinct, with the blending of functional and actual sovereignty in cases of occupation—*i.e.* when human rights meet humanitarian law in international conflicts as opposed to civil war situations. Making war invisible as a special set of circumstances for human rights legitimates *a priori* decision-making by the court just like it legitimates decision-making

312. *Musayev*, ¶ 118.

313. Although, in order not to lose sight of the general issue at stake here, one has to remember that the perceived contemporary landscape of war, within and beyond the “War on Terror,” has changed the terms of the difference regardless of the traditional framework. Even though a term like “counter-insurgency” was already a challenge to the traditional frame by being a war-like police-operation (or vice versa), especially as it depicted the strategy deployed against national liberation movements, the type of “insurgency” that it is designed to “counter” in contemporary environments is presented as the source of all confusion. See the opinion of the chief strategic advisor on counter-insurgency to the United States Armed forces in Afghanistan, in David Kilcullen, *Counter-insurgency Redux*, 48 SURVIVAL 111 (2006).

by the State in occupied territory. Human rights law, as the yardstick of political normalcy, simply normalizes that to which it extends its gaze. As a result, the issue of irrelevance of humanitarian law points, formally speaking, to the fact that the only question that will be asked is whether a state of emergency has been declared, to then proceed to an evaluation of the proportionality of force used to restore order based on the existence or inexistence of a declared emergency.³¹⁴ Given that the only consideration in a human rights case is whether the State acted legitimately within its jurisdiction, it appears therefore that the human rights perspective is logically blind to the notion of civil war, and can consider with an epistemologically straight face that the use of the air force and artillery is a regular form of anti-terrorist law enforcement.³¹⁵

In terms of legal argument, however, that line is not even minimally outlandish, given that human rights law governs the behavior of States towards non-State actors within a defined jurisdictional scope (like territory), and bombing people constitutes such a type of State behavior. Moreover, because of the premises on which human rights law rests, that specific kind of State behavior does not differ in kind from any other State action, from taxation to providing health care, as far as human rights law is concerned. Contrary to (traditional) human rights law, humanitarian law in civil wars also addresses the behavior of non-State actors, as a result of forcing the principle of distinction into the insides of State sovereignty. It addresses therefore also individuals, most notably through criminalization of certain violations, but not exclusively.³¹⁶ Disregarding “war” as a legally relevant set of specific facts—which could require referring to humanitarian law as a set of meaningful facts for the sake of interpretation—amounts to making non-State actors visible only as a circumstantial element in evaluating State action. Here evaluation of State action means approaching it as State action presumed to be legitimate (otherwise human rights would make no sense as a constitutional yardstick), something that is obviously not true from the perspective of the opposing side in a civil war. Human rights

314. *Isayeva*, ¶ 125.

315. *Id.* ¶ 174.

316. *Compare* Mines Protocol II, *supra* note 231, art. 3, ¶ 2 (“Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it...”) *with* Mines Protocol II, *supra* note 231, art. 1, ¶ 2:

This Protocol shall apply, in addition to situations referred to in Article 1 of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

See Use of Mines, Booby-traps and Other Devices, *supra* note 231, art. 1, 3.

makes the context of a civil war into a just war situation, by implicitly rejecting the idea of equality of parties, despite what the passing reference to “combatants” seems to anticipate. Human rights law has to disregard the essential circumstance of shaky State legitimacy and the use of military violence for political purposes, because those circumstances are foreign to the core of human rights in the precise sense of putting the traditional concept of human rights law at risk. When the situation is a *de facto* state of emergency, but is not so in legal terms because the State has not declared it, we can see how the domain of normalcy has expanded to encompass the daily shelling of entire regions as normal State behavior. In simple words again, civil war means the repression of extra-constitutional contestation of State action as legitimate State action, and normal human rights cannot see it outside of the state of emergency. By very natural implication and definition, the operation of human rights law in all cases legitimates state action by discussing its modalities, never its principle.

Human rights law as a whole simply cannot address a situation of civil war *qua* civil war in any legally meaningful way, beyond punctual instances such as the dwindling and indirect presence of war as a justification for the death penalty,³¹⁷ or for the already mentioned prohibition of war propaganda.³¹⁸ It treats the deployment of war machinery, in the enigmatic terms of the European Court, as any other “*situation in which it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life.*”³¹⁹ More generally, it is considered as any act of sovereign power that interferes with individual rights for the benefit of the community, or, in the European case, in light of what is necessary in a “democratic society.”³²⁰ Human rights law evaluates therefore the deployment of force in terms of the standard of “arbitrary” deprivation of life, where arbitrariness is interpreted as the negative yardstick of a reasoned, rational, reasonable calculation: “the force used must be strictly proportionate to the achievement of the permitted aims.”³²¹

Here, one could note in passing the important fact that proportionality as a tool of evaluation is a point of contact that is otherwise implicitly assumed between humanitarian law and human rights. This is what one will find also behind the extension of human rights into the domain of military occupation, which is otherwise governed by humanitarian law. The

317. See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty art. 2, Apr. 28, 1983, ETS 114; and the subsequent European Courts of Human Rights [Eur. Ct. H.R.] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances, pmb., May 3, 2002, E.T.S. No. 187.

318. ICCPR, *supra* note 216, art. 20(1).

319. Isayeva, *supra* note 308, ¶ 169.

320. *Id.*

321. *Id.*

European Court adopts into its language, beside the brief mention of “combatants,” words like “civilian,” and frames the assessment of proper governmental response (in a context of what from the Court’s own description looks like an armed conflict) in the general language of balancing and proportionality. That suggests “proportionality” in the very sense of humanitarian law. It is undeniable that the reference to proportionality is inherent to the implementation of human rights,³²² but that idea of proportionality refers to a means/ends relationship that is, as should be clear from the European Court’s own idea of proportionality, significantly different from that of humanitarian law. However, proportionality here serves clearly as a substantive bridge for any situation where the State is engaged in systematic violence, regardless of its magnitude, under the province of human rights; the implicitly exclusive limitation is that the State must have jurisdiction. The European Court does not therefore ignore humanitarian law because it does not have jurisdiction over that body of law; that issue is left un-discussed given that the Court precisely does not even engage with the need for humanitarian law to enter the frame. What appears, rather, is that the Court does not look at humanitarian law because (civil) war is nothing special for human rights, as long as jurisdiction of the State is not *a/in* question. In general terms, the possibility that civil war may remain invisible in a human rights perspective such as that of the European Court is therefore an illustration of the legal construction of “war” and the connection of that legal construction with distinction and sovereignty. War here is a set of facts, which from the perspective of human rights are seen as any other set of facts. When war is reabsorbed by human rights, as opposed to being kept outside of the bounds of the social contract, it logically disappears.

2. *Legalizing Occupation by Facts*

The European Court has also had the opportunity of considering the operation of humanitarian law itself within the jurisdiction of the State. It has done so only in terms of approaching it as a relevant fact in deciding whether a Convention right had been violated: in that specific instance the proper application of humanitarian law was itself the subject of a complaint concerning fairness in a war crimes trial.³²³ Significantly, dissenting judges considered that the majority of the Court had effectively engaged in a mistaken interpretation of humanitarian law as a fact, even in the absence of

322. A systematic discussion of the use of proportionality in human rights law can be found in Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, (Jean Monnet, Working Paper No. 9, 2008), available at <http://centers.law.nyu.edu/jeanmonnet/papers/08/080901.pdf>.

323. *Kononov v. Latvia*, App. No. 36376/04, Eur. Ct. H.R., Third Section (2008), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=838477&portal=hbkml&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

a power to interpret humanitarian law as law.³²⁴ Considering the difference between interpreting the law as a fact and actually correcting the interpretation of the law by the national courts, the Court's majority was chastised by dissenting judges for doing the former while pretending to be doing the latter, *i.e.* treating humanitarian law as law over which it can impose an interpretive supremacy that it has only over the Convention.³²⁵

In other words, in the Chechnya cases, the issue was that of human rights being blind to war as a legally meaningful situation, which would have otherwise triggered questions relating to the application of humanitarian law. Here the issue is that of a human rights body being limited to considering humanitarian law as a fact, and of being structurally enjoined from interpreting it as relevant law. What these positions have in common is that they do not deal with the relationship between humanitarian law and human rights as two bodies of law, but rather with the application of human rights standards to humanitarian law as a fact, as in the case of talking about "civilians" while not applying the law that defines entities as being "civilian," that is, individuals who under the laws of war are not legitimate

324. *Id.* ¶¶ 8-14 (Costa, Kalaydjiev, Poalelungi, J.J., dissenting). It should be noted that when the case was then transferred to the Grand Chamber of the Court, the decision got into the development and contents of international humanitarian law in even greater detail (including a lengthy discussion of the evolution of the "principle of distinction"), without either the Court, the applicant, the respondent, or the dissenting judges mentioning anything concerning the Third Section dissenters' view on the jurisdictional difficulty of treating humanitarian law as indeed a fact and not law (except for mentioning in passing that the European Court is not an appellate criminal court.) See *Kononov v. Latvia*, App. No. 36376/04, Eur. Ct. H.R., Grand Chamber (2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=867803&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

325. *Korbely v. Hungary*, App. No. 9174/02, Eur. Ct. H.R., Grand Chamber, ¶ 2 (Aug. 19, 2008), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=korbely&sessionid=68147263&skin=hudoc-en>:

In its recapitulation of general principles, the judgment reiterates that it is not normally the Court's task to substitute itself for the domestic courts and that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. It rightly points out that this also applies where domestic law refers to rules of general international law or international agreements, the Court's role being confined to ascertaining whether the effects of such an interpretation are compatible with the Convention ... Nevertheless, the majority, without any explanation, head off in a different direction and, on a flimsy, uncertain basis, quite simply substitute their own findings of fact for those of the Hungarian judicial authorities.

(Lorenzen, Tulkens, Zagrebelsky, Fura-Sandstrom and Popovic, J.J., dissenting).

combatants, not legitimate targets, and therefore not entitled to prisoner-of-war status in the context of an international armed conflict.

The foregoing provides in any event a basis for the application of human rights to situations of occupation. Whereas for international law occupation is a separate legal regime and part of the *lex specialis* (just like "civilians" or "unnecessary suffering"), human rights standards are here applied by human rights bodies in the discussion of "war" situations because occupation is considered *de facto* jurisdiction. The transition from legal regime to facts makes the issue as to whether there is or was a "war" disappear, as far as human rights are concerned. The context of occupation is approached in deliberately general abstraction from the essential difference between jurisdiction and occupation as two fundamentally opposed legal regimes.³²⁶ This is done in turn on the basis of the notion that, to the axiomatic jurisdictional attitude of considering any extra-jurisdictional law as a fact,³²⁷ corresponds the possibility of considering "occupation" as a factual deployment of the power of the State as a State, and not a particular legal regime which otherwise gives meaning to that deployment in the first place. In the words of the European Court:

In this respect the Court recalls that, although Article 1 [*i.e.*, States respect and protect rights of individuals under their jurisdiction] sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case-law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 [*i.e.*, the prohibition of torture inhumane and degrading treatment], and hence engage the responsibility of that State under the Convention In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities,

326. There is a historical reading of the development of the law of occupation, which places emphasis on the notion that "occupation" was devised against the backdrop of the development of "sovereignty" and in systematic contrast with it. *See generally* Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 *LAW & HIST. REV.* 621, 621-48 (2008).

327. For reference to the canonical statements, see *Payment of Various Serbian Loans Issued in France* (Fr. v. Serb.), 1929 P.C.I.J. (ser. A) No. 20/21, at 18-20 (July 12); and *Certain German interests in Polish Upper Silesia* (F.R.G. v. Pol.), Merits, Judgment, 1925 P.C.I.J. (ser. A) No. 7, at 19 (May 25). A particular famous discussion of this version of legal dualism can be found in the *Nottebohm* case, where the ICJ explained the relationship between invalidity and inopposability of a domestic legal act, stating in the course of the presentation that domestic law is just a fact and the invalidity of the domestic legal act is a question of domestic law, not international law. *Nottebohm Case* (Liech. v. Guat.), Judgment, 1955 I.C.J. 4 (Apr. 6). On that topic, an early reminder of this traditional position in international law was provided by the already mentioned dissent by Judge Anzilotti regarding the assessment of the constitutionality of domestic legal decrees under the Constitution of the Free City of Danzig. *See Consistency of Certain Legislative Decrees with the Constitution of the Free City*, 1935 P.C.I.J. (ser. A/B) No. 65, at 60-66 (Anzilotti, J., dissenting).

whether performed within or outside national boundaries, which produce effects outside their own territory Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it is exercised directly, through its armed forces, or through a subordinate local administration.³²⁸

The jurisdictional gaze of human rights makes war disappear by ironing out the legal construction of war, and such corollaries as “occupation”; that constitutes the basis for generalizing the notion that the use of artillery and air power can be significantly translated into human rights lingo as something akin to law enforcement. Significantly in the case of occupation, we have moved from civil wars to international wars, thus functionally analogizing deployments of force not only across the police/military divide, but also across the internal/international divide. The perspective of the Court is very naturally that of generalizing the condition of normalcy as simply that of there not being a situation of emergency, understood to constitute the breaking point of the State’s margin of appreciation in defending its own existence. Adding “factual” jurisdiction seems in that sense not only innocuous but also quite unsurprising, in that the possible background “illegality” constituted by a violation of the *jus ad bellum* is irrelevant simply by virtue of being legally invisible (although mentioned in passing) – occupation is “like” sovereignty as far as human rights are concerned. In that sense the legal endpoint for the European Court’s trajectory of engagement with armed conflict will be the *Bankovic* decision,³²⁹ decided again without resorting to humanitarian law (and again despite the applicants’ formal suggestions). *Bankovic* tries to make sense jurisprudentially of the implications of extending human rights to factualized State power, and bumps into the notion that human rights and war do not fare well together.

3. *The Bankovic Containment Strategy*

Following the *Lotus* dictum on the nature of State jurisdiction,³³⁰ the Court here asserts that extraterritorial application of the Convention is

328. *Loizidou*, ¶ 62. See also *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R., ¶¶ 68–71 (2004), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=issa&sessionid=68147263&skin=hudoc-en>.

329. *Bankovic*, 2001-XII Eur. Ct. H.R. 333.

330. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7):

exceptional,³³¹ and the Convention does not accept a general “cause-and-effect” theory of jurisdiction,³³² which would otherwise impose human rights standards onto any action of the State, just because it emanates from the State. That is an interpretive statement on the seemingly unstoppable reach of the *Loizidou* pronouncement concerning the possibility of factualizing jurisdiction and sovereignty. As applied to the case at hand, the Court's decision is that an act of killing someone by dropping a bomb on them is not governed or measurable by human rights standards if it happens on foreign territory in the course of a punctual military operation. The otherwise obvious link of control that exists between the victim and the agent of the State (the military aircraft) does not constitute a link that can be assimilated to “jurisdiction.” For the assimilation to be possible, one needs a theory of jurisdiction that fragments the Convention into a variety of standards governing a variety of situations of “control” by the State, each duty/right relationship arising when a particular type or degree of control exists. For instance, for the purpose of imposing on a State the duty not to deprive an individual of their life arbitrarily, one needs a situation where the State has at least control over the relevant aspect of that person protected by the right to life, *i.e.* it has the capacity of ending that person's life. That is not, says the Court, what States understand “jurisdiction” to mean for the purposes of the Convention.

[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts 'outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property' and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

331. *Bankovic*, 2001–XII Eur. Ct. H.R. 333, ¶ 73. The statement comes from *Issa*, ¶ 68.

332. *Id.* ¶¶ 57, 69.

Stated from another perspective, the general principle is that the Convention is a European constitutional bill of rights, which explains why the jurisdiction of the Court (whose job it is to interpret the Convention in applying it to State action) is tied to the jurisdiction of States (who are by the terms of the Convention a discreet number of States each deploying their own jurisdiction according to received principles of international law.) As a result, for the Court at least, instances involving anything below effective control over a foreign territory (such as in cases of occupation), or equivalent control of a person abroad (such as in consular facilities), whether in a lawful or unlawful situation (which is obviously irrelevant as such given that all extra-jurisdictional law is a fact),³³³ will be deemed to be beyond the scope of the Convention. Those situations are beyond the scope of the stated human rights duties of the State, simply because such duties are tied to jurisdiction; one asks whether there is jurisdiction to see whether there are duties, as opposed to the opposite.³³⁴ In plainer terms, the State cannot in principle act as a State beyond its jurisdiction, because that would mean that it is acting outside of itself; for human rights purposes, jurisdiction is territorial, and any actions beyond that domain are, as far as human rights are concerned, not State actions at all. The borders of the domain of jurisdiction may be blurry, because of such phenomena as military occupation and exercise of State power within the facilities of diplomatic missions in foreign territory. But there is a border, and that is in principle the border of the State's territory.

The position of the Court in *Bankovic* is however untenable and, after *Loizidou*, any argument on the limits of "jurisdiction" based on a textual or contextual interpretation of Article 1 of the Convention will be largely unconvincing. That was already obvious when the Court deemed it proper to justify the extension of human rights to factual-control situations on the grounds of good human rights policy. Citing approvingly the United Nations Human Rights Committee, the Court had explained that: "Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could

333. *Issa*, ¶ 71 (extending responsibility of States for acts committed on foreign territory with regards to individuals under their control).

334. *Bankovic*, 2001–XII Eur. Ct. H.R. 333, ¶ 75:

Furthermore, the applicants' notion of jurisdiction equates the determination of whether an individual falls within the jurisdiction of a contracting state with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention. These are separate and distinct admissibility conditions, each of which has to be satisfied in the afore-mentioned order, before an individual can invoke the Convention provisions against a contracting state.

not perpetrate on its own territory.”³³⁵ In *Bankovic* the European Court sets formal jurisdictional limits to the obligations of State parties based on the notion that obligations follow jurisdiction, and so jurisdiction must be based on something other than obligations (which was the position of the claimants). But the policy reasons behind the move to extend obligations to occupation situations is that obligations should follow the State when it steps out of its formal jurisdictional space; as a State bound by the Convention, it would appear strange that it could behave contrary to the Convention at all.

In other words, the Court expounds its understanding of the jurisdictional limits of human rights obligations in a way that converges its factual understanding of war and its factual relationship to humanitarian law, and moves towards entrenching its formal and strict image of human rights as associated with the exercise of sovereignty. Not formal sovereignty, however, but rather the substance or effect of sovereignty is what is required for the purpose of extending the Convention to situations of occupation. The weakness of the effort to contain the extension of human rights’ evaluative reach, once the idea of jurisdiction has been factualized,³³⁶ becomes little less than blatant when the *Bankovic* Court deems it necessary, in line with what it does with situations of *de facto* jurisdiction, to support its textual and contextual interpretation of Article 1 with teleological policy considerations. While the parties insist quite legitimately that a gradualist vision of jurisdiction is precisely implied in the application of human rights to situations of occupation,³³⁷ the Court turns eventually to an even broader justification, which is borrowed from the foundational reasoning in *Loizidou* and lies at the root of the above quoted *Issa* dictum borrowed from the Human Rights Committee. According to the Court, the Convention aims at establishing a “European public order,”³³⁸ geographically defined by the outer jurisdictional limits of the State parties. Speaking of the turn to functional equivalents of sovereignty, the Court explains that “the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour [*sic*] of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention”; by a territory “normally covered,” the Court explains that one should mean a territory within the regional space of public order.³³⁹ The Court thus justifies that, in cases of occupation, *de facto* jurisdiction is the equivalent of *de jure* jurisdiction for the purpose of Article 1 of the Convention, on the grounds

335. *Issa*, ¶ 71.

336. *See Bankovic*, 2001-XII Eur. Ct. H.R. 333, ¶ 81 (noting the ambiguous arguments of the Court when trying to distinguish *Bankovic* from the *Issa* and *Ocalan* cases, both dealing with armed activities of the State abroad).

337. *Id.* ¶¶ 47–48.

338. *Loizidou*, ¶ 75.

339. *Bankovic*, 2001-XII Eur. Ct. H.R. 333, ¶ 73.

that, had the occupation not happened, human rights norms would have been in force for the responsible (and now ousted) sovereign. It is the reverse of the Human Rights Committee's statement according to which a State should not do something abroad that would be internationally wrongful if done at home. The ousting of the sovereign through occupation of the territory is necessarily, as far as the Court is concerned, equivalent to the acceptance by the occupying power of the human rights responsibilities of the ousted sovereign.

Why that is, and why one should accept that acquiescence and occupation are functionally equivalent, is far from clear, even though the whole argumentative line is supposed to support that position. The series of steps can be seen to match in reverse the positions of the Inter-American system, in which the Court finally settled for formal limitations mandated by sovereign consent. Here the Court, in order to first extend jurisdiction to occupation and then contain it there, follows the Commission in sliding from formal to substantive arguments, but in reverse. The Court bases its argument on Article 1, which is said to naturally limit obligations to *de jure* and *de facto* jurisdiction, but then decides to contain it by saying that although the European public order may seem to mandate that all member States should behave everywhere in the same way, they should not because otherwise human rights would follow them and that is not what jurisdiction means. The *Loizidou* argument is impossible to contain, yet in the course of doing so, the Court has made the distinctions between normalcy and exception, between norm and fact, between domestic and international, and between peace and war considerably less persuasive. Yet it has done so for the benefit of human rights and public order.

Witnessing the steps taken by the Court, in reference to issues relating to war, is instructive for the purpose of understanding how factualizing sovereignty is the key to a complete merger of human rights and humanitarian law, into some sort of non-legal human rights talk that would effectively render the political meaning of the system invisible. In *Bankovic*, to limit the expansion of the "jurisdiction" of States for the purpose of human rights, the Court cannot plausibly rely on factual criteria, such as "overall control,"³⁴⁰ "effective overall control,"³⁴¹ or "authority and control"³⁴² on their own. How having the ability to destroy one person's right to life is not effective control is unclear, especially if one has also to establish the essential difference between being under the control of an aircraft and being under the control of embassy officials (which counts as effective control),³⁴³ and especially if we abandon, as we should, the notion

340. *Issa*, ¶ 73.

341. *Loizidou*, ¶¶ 49–50.

342. *Ocalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R., ¶ 91 (2005), <http://cmiskp.echr.coe.int/>.

343. *Bankovic*, 2001–XII Eur. Ct. H.R. 333, ¶ 71.

that diplomatic missions are territorial enclaves of the sending State.³⁴⁴ One would have to find parameters that would provide a solid basis for the distinction with a case where punctual physical control by agents of law enforcement is sufficient, in foreign or international territory, to establish a jurisdictional link for purposes of Article 1 of the Convention.³⁴⁵

The policy considerations, referring to gaps in the regional public order, produce complications. In situations of occupation, the State is said by the Court to be responsible for human rights, on the one hand, if under the previous (normal) circumstances human rights were applicable on that territory. But it is responsible, on the other hand, also because it is exercising “all or some” of the competences of the sovereign. The two grounds are jurisdictionally different, since the first refers to the occupier’s jurisdiction and the second to the occupied country’s (lost) jurisdiction. Saying that occupation is equivalent to sovereignty for the purpose of human rights because of control is one theory, which has certainly been accepted by most if not all human rights bodies,³⁴⁶ even though it is never fully explained. Sovereigns are responsible for human rights even when they are not in full control, and the direct analogy between sovereign jurisdiction and effective control for the purpose of responsibility, if intuitively plausible, is therefore not undeniable.³⁴⁷ Yet even if one admits the connection between jurisdiction and effective control, the “gap-in-the-European-public-order” argument cannot support it, since it could just as well support the arguments for the gradual-jurisdiction approach to human rights duties of the State. That becomes more apparent when one asks what the difference is between a situation where the territory of a non-party is occupied and the situation where the territory of a state party is occupied, if in both cases we are talking about a State party performing the occupation and exercising effective control. In the first case, there is a stated risk of a “gap” in the regional public order, while in the second there is no such risk, and that is the only thing that the Court can tell us. The gap argument has

344. An early judicial rejection of the idea that diplomatic missions are territorial enclaves, deriving from the move towards a functional idea of what diplomatic immunities are, can be found in *Fatemi v. United States*, 192 A.2d 525 (D.C. 1963).

345. *Ocalan*, ¶ 92.

346. See, e.g., *Victor Saldano v. Argentina*, Inter-Am. C. H. R. Report No. 38/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. ¶ 19 (1998).

347. One aspect of that notion comes in the form of a debate about responsibility of States for acts occurring outside of their territory and committed by non-State agents. See, e.g., Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MOD. L. REV. 598, 598–625 (2007). Another aspect of that comes in the notion that the “duty to promote,” and possibly also the “duty to fulfill,” which constitute two of the four duties attached to each right, do not need exercise of jurisdiction or even control over anybody and can apply to abstract acts of legislation or regulation themselves. See the already mentioned *Roma Rights Centre*, *Regina v. Immigration Officer at Prague Airport* [2004] UKHL 55.

nothing to do with effective control, as a justification for the implementation of the Convention extraterritorially, even though it also sounds like a plausible, yet independent, policy consideration presumably relating to vested rights, expectations, and the relatively more stable nature of human rights regimes in the law of treaties.³⁴⁸ If one accepts effective control only within the sphere of public order, that seems to imply collective responsibility for the implementation of the Convention, an argument that is also hypothetically defensible, but that thankfully the Court does not try to develop.

The result is that the reference to the goals of the treaty effectively tries to limit the otherwise impossibly contained idea of *de facto* jurisdiction in an era where extraterritoriality abounds. There is a pressing need at work to abide by the formal borders of the human rights regime, which hinges on the sovereign border, and here that need is manifested by the fact that the Court resorts to almost every single one of the available tools for treaty interpretation,³⁴⁹ including consideration of the *travaux préparatoires* and a discussion of sister treaties (which interestingly it rejects as a valuable tool, while mentioning in the same breath the *travaux* leading to the ICCPR).³⁵⁰ At the end of the day, the Court's creative dealing with the ultimate consequences of factualizing sovereignty sustains the message that there always is an inside and an outside of the sphere of application of human rights, and the ideal marker of the border is sovereignty. The turn to effectiveness is however slippery in that it recognizes the extra-jurisdictional (and therefore out-of-body) exercise of power by the State as plausibly legitimate under human rights law and therefore analogous to normal behavior by the State. That the bombing of "civilians" outside of the State's territory is invisible to human rights law is only an extension of the invisibility of war operations within the State, or the invisibility of occupation as a situation resulting from war. From its inherent hostility to war, human rights law is made into a normalizing machine for the worst of political violence.

As far as legitimation of State coercion is concerned, it should be noted that the inside/outside distinction marked by the sovereign border has certainly been noticed by States who have attempted to do abroad what is not allowed at home, on the basis that in most situations they precisely do not have "jurisdiction" abroad, even though they are actually exercising State power.³⁵¹ As far as the *Bankovic* idea is concerned, and with regard to the European Court's dealing with the relationship between human rights

348. See *supra* note 46, at 112 (referring to the International Law Commission's discussion of "humanitarian" provisions, including human rights treaties, which are not subject to the mechanism of suspension for material breach).

349. Vienna Convention, *supra* note 46, arts. 30–33.

350. *Id.* at art. 32.

351. See *Roma Rights Centre* [2004].

and war, the most important aspect is the rhetorical insistence on the distinctiveness of the normal space of operation of human rights within an “inside” (the “*espace juridique*”) that can possibly be stretched at times, but that is contrasted with an “outside” (the “world”) to which the European instrument was not meant to be applicable.³⁵² The idea that, even after the factualization of jurisdiction, there is still an ideal border between the inside and the outside finally explains the otherwise not-so-straightforward rejection by the Court of what it depicts as the alternative position on jurisdiction presented by the claimants. That interpretation, the Court says: “equates the determination of whether an individual falls within the jurisdiction of a contracting state with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention.” That, the Court says, constitutes a confusion of “separate and distinct admissibility conditions, each of which has to be satisfied in the afore-mentioned order, before an individual can invoke the Convention provisions against a contracting state.”³⁵³

What we learn from the European Court here is that the issue of dealing with war-like situations through human rights is substantively dictated by the fact that human rights law is concerned with the effects of the State’s (abuse of) coercive power on individuals. The above suggests that the operation of human rights in zones of occupation is therefore the continuation of the invisibility of civil war for human rights standards. The factual treatment of civil war situation by human rights normalizes civil war by making it functionally equivalent to “counter-terrorist” law enforcement, which makes that mode of reasoning resonant with larger issues in the contemporary political setting. Similarly, the operation of human rights in occupation entrenches a technocratic notion according to which occupation is functionally equivalent to sovereignty, which is in turn based on the premise that sovereignty is plausibly seen as a (bunch of) function(s).³⁵⁴ Finally, the issue of jurisdiction, which is the bridge for the extension of human rights normalcy, allows the Court to reject the relevance of the ICJ’s *lex specialis* idea by normalizing everything legal that would be outside of the State’s jurisdiction as being invisible to the Court itself. That is rendered equally shaky by the fact that the Court has been able to observe human rights and their violation far away from the borders of the European public order.³⁵⁵

352. *Bankovic*, 2001–XII Eur. Ct. H.R. 333, ¶ 78.

353. *Id.* ¶ 75 (emphasis added).

354. See Martti Koskenniemi, *Occupied Zone – “A Zone of Reasonableness?”*, 41 *ISR. L. REV.* 13 (2008).

355. See, e.g., *Al-Adsani v. United Kingdom*, 2001–XI Eur. Ct. H.R. 79, ¶ 58 (accepting that an individual has been the victim of torture, within the meaning of Article 3, while the acts of torture themselves, as well as their relevant effects, are not within the jurisdiction of the Court or any State party to the Convention.).

The more or less convincing break presented by *Bankovic* constitutes an attempt at establishing the centrality of the distinction between *de jure* and *de facto* sovereignty, meaning here the importance of the form of sovereignty for the logic of human rights, as it emanates from the Preamble to the Universal Declaration of Human Rights. The problem is that, as noted by the European Court itself, one cannot second-guess the State in its appreciation of the means to be deployed to defend itself. By introducing the logic of the “margin of appreciation” into the domain of war, suddenly we have lost sight of the fact that human rights law does not regulate war—it is supposed to oppose it.

D. *Lex Generalis* and War in Africa: Redemption

A creative alternative to that type of ambiguous courtship of war by human rights starts with the idea that war itself is a problem for human rights, if not a violation of human rights. That leads then to a more complicated and less compromising relationship between human rights and humanitarian law. That starting point is provided in the jurisprudence of the African Commission on Human and Peoples’ Rights.

1. *From War as Law*

Considering the European Court’s engagement with war, an alternative starting point is that, logically, war should be understood as an exceptional situation, and *lex specialis* would therefore mean that we have first of all (from the perspective of human rights, and not that of the ICJ) crossed the border of normalcy into the domain of anomaly, where the exceptions apply. Such an exception would be for instance constituted by an amendment to the otherwise general right to life, in the spirit of what is noted by Article 15 of the European Convention, according to which lawful acts of war resulting in death are a “derogation” from Article 2. This is so because “war,” understood from the model of inter-State war, is the breach of sovereignty by another sovereign—that is, the breach of (legal) normalcy. And in contemporary terms, this notion forces the meeting of human rights with the *jus ad bellum*, the issue of the legality of war itself. If in contexts otherwise approachable by humanitarian law as “non-international armed conflicts,” “war” disappears for human rights, the fact that we can extend human rights to situations of occupation without paying attention to the fact that it is a “war” makes human rights suddenly agnostic about “war” in general. That can be seen as a problem, and therefore one can choose another approach, which starts with an expression of human rights’ existential opposition to war as war. Human rights law rejects war not because it is violence, but because it is an instantiation of violence precisely conceived of as a war or, more technically, an “armed conflict.”

“War” can be accepted, as far as international law is concerned, as the result of the operation of particular norms, as opposed to a fact of life that is

received passively by law. This is confirmed by the European Court's mistreatment of war following its factualization of both war and sovereignty. The upsetting (and now generally rejected) conclusion above was that as long as human rights operate there is legally no "war," in that Chechnya is not a (civil) war in any distinctive way visible to human rights law, in the same way that the context of the Basque country can be talked about without taking seriously any claim about the legitimacy of a violent struggle for self-determination.³⁵⁶ Again, from the perspective of "human rights," the only question is whether there is a state of emergency, because the state of emergency encompasses (the state of) war. This means concretely that, in the terms of Article 15 of the European Convention, the issue will be whether the state has acknowledged a state of "war," since otherwise there is no deference to humanitarian law at all.³⁵⁷ That civil wars are theoretically invisible to human rights *qua* wars is therefore the flipside of the fact that war is indeed a legal construct, *i.e.* the result of the operation of other norms. But additionally, this sequence of steps from human rights to war shows also the strangeness of the application of human rights to occupied territory; on top of normalizing through rights a temporary and necessarily abnormal situation (under the *jus ad bellum*), the operation of human rights here disregards the fact that there is an international war going on. The connection of occupation to (international) war should at a minimum trigger the question of whether the occupied territory is not precisely and by definition under a state of emergency, expressed in the special regime of the Fourth Geneva Convention. The problem lies in the fact that the operation of humanitarian law does not depend on a formal deferral by human rights, but depends on the factual situation of "armed conflict," or possibly on the *jus ad bellum* having been implemented or breached. The blindness of human rights, which is otherwise plausibly connected to the fact that human rights is hostile to war, has to meet the fact that the existence of war does not depend only on the sovereign, but also on other sovereigns.

356. Ass'n Ekin v. France, 2001-VIII Eur. Ct. H.R. 323, ¶ 48.

357. I leave aside the obvious, yet here largely irrelevant, issue of whether a given State has or has not declared such state of emergency, a gesture that conditions the actual operation of the state of emergency within human rights law. In more practical terms, as we turn to the African regional system of human rights, the issue becomes irrelevant given the absence of the "state of emergency" or any derogation clause in the Banjul Charter. See a reminder in Amnesty International v. Sudan, Comité Loosli Bachelard v. Sudan, Lawyers Committee for Human Rights v. Sudan, and Association of Members of the Episcopal Conference of East Africa v. Sudan, African Comm'n on Human & Peoples' Rights, 13th Activity Report, Commc'ns Nos. 48/90, 50/91, 52/91, 89/93, 137, ¶ 79, AU Doc. AHG/222 (XXXVI) (1999).

2. Towards War as a Violation of Human Rights

The alternative take on human rights' reading of war must therefore start with human rights' hostility to war, and the notion that, contrary to the human rights regime, the structure of humanitarian law implies the existence or hypothetical existence of several sovereigns. Some clues as to what that alternative view is come from the African Commission on Human and Peoples' Rights in its landmark case on the situation in the Democratic Republic of the Congo (landmark if only because it was its first decision on a State-to-State complaint). The Commission faces in this case the exact same situation that had been presented also to the ICJ,³⁵⁸ but from the perspective of a human rights body, *i.e.* a body not benefiting from the god's eye point of view that arbitrates between *lex specialis* and *lex generalis*.

To summarize a case that has received too little attention of the type advocated here, the Commission produced a series of legal maneuvers that express in a less normalizing way that war can be approached by human rights as a bad thing before anything else. That approach would contrast with the alternative, observed in the case of the European Court, which is for human rights to approach war as some set of brute facts to be governed or managed, without any "structural bias" against the very phenomenon, despite the Universal Declaration's and so many other treaties' preambles. In other words, the perspective here would be that human rights can plausibly approach war in the way it approaches genocide, as something that is meaningful to its normative system, as opposed to approaching war only as human rights law also approaches crime, which is only indirectly meaningful to it (for instance in talking about war propaganda). That shift of perspective constitutes also a return to the political message of human rights, which connects humans, the Sovereign, and the repulsion of the state of nature to the borders of the polity and into the domain of the "state of war."

The way the African Commission implements the alternative sensibility of human rights follows a few simple steps. The preliminary is that, for an institutional body created by international law, the forceful invasion and occupation of one country by another country is a violation of sovereignty, territorial integrity, and the general obligation to settle international disputes peacefully, that is, a violation of the purposes (Article 1) and principles (Article 2) of the Charter of the United Nations.³⁵⁹ Those violations,

358. Armed Activities on the Territory of the Congo, *supra* note 273; Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment on Jurisdiction and Admissibility, 2006 I.C.J. 6 (Feb. 3 2006).

359. Democratic Republic of Congo v. Burundi, Rwanda, Uganda, African Comm'n Human & Peoples' Rights, Comm'n No. 227/1999, 123-24, 125-26, AU Doc. EX.CL/279 (IX) (2003).

including the violation of the *jus ad bellum* as enshrined in the UN Charter, constitute a violation of the African Charter on Human and Peoples' Rights also, in that they constitute violations of the right of peoples to peace and security (Article 23), as well as the all-important right of peoples to self-determination (Article 20).³⁶⁰ From there, "*the Commission having found the alleged occupation of parts of the provinces of the Complainant State by the Respondents to be in violation of the Charter cannot turn a blind eye to the series of human rights violations attendants [sic] upon such occupation.*"³⁶¹

In other words, occupation is by definition an illegal situation in which the human rights of individuals and peoples are being denied as such, without the need for the occupier to do anything else beyond occupying. Any other wrongdoing in the course of the situation of occupation will simply be added to the list, but all actions, whether they are legal or not for international humanitarian law, will be seriously tainted, as far as human rights are concerned, because they all stem from an original violation of human rights law. That initial violation, a situation that lives in legal anomaly, is precisely what justifies the application of humanitarian law, which as we saw is agnostic about how we got there and who is to be blamed. But human rights law on its part is not agnostic; it is a firm believer in the evil nature of war, to the point that it even prohibits advocating it.

When we get to humanitarian law, which we undeniably reach because there has been a war, the problem will be again that of dealing with it from the perspective of human rights, the *lex generalis*. The Commission does that unsurprisingly in terms of interpreting the standards of the African Charter, over which it has interpretive jurisdiction, as opposed to dealing with humanitarian law itself. Technically, that sounds like the Inter-American Commission, whom the African Commission incidentally holds in great esteem.³⁶² The African Commission, however, deals with the issue of the *lex specialis* in a way that parallels exactly the key issue at stake in the legal relationship between the two bodies of law, that is, the connection between the supervising bodies' jurisdiction and each body of law's relationship to sovereignty. On the basis of the Banjul Charter,³⁶³ and "[b]y

360. *Id.* ¶ 68.

361. *Id.* ¶ 69 (emphasis added).

362. Article 60 reads as follows:

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised

virtue of Articles 60 and 61 the Commission holds that the Four Geneva Conventions and the two Additional Protocols covering armed conflicts constitute part of the general principles of law recognized by African States, and take same into consideration in the determination of this case.”³⁶⁴ After considering the violation of the *jus ad bellum* as a violation of human rights, that interpretive ground allows the Commission to translate violations of the *jus in bello* into violations of human rights standards. In an important interpretive move, the idea that human rights do not cease to operate in war³⁶⁵ is reinterpreted to mean that the process of war does not put an end to human rights, but rather constitutes a violation of it. All the violations that follow are simply ramifications of the fact that the invasion is a violation of the foundational human right, the right to self-determination, and its corollary right to peace and security. And both rights happen to be within the material jurisdiction of the African Commission.³⁶⁶

This sequence of arguments allows the Commission to dare the incredible statement that, from the perspective of human rights law, killing as part of war is indeed a problem. Human rights cannot, *pace* what the *Bankovic* Court suggests however sweepingly, close its eyes on wartime killing, simply because it is war, or because it occurs abroad. War is a human rights issue *qua* war, not simply as violence; the structure or form of war, which distinguishes it from crime or law enforcement, and is then legally translated into such operative ideas as the principle of distinction, make it an issue of relevance to human rights. In particular, and astonishingly so, if one considers an alternative worldview that considers

Agencies of the United Nations of which the Parties to the present Charter are members.

African Charter, *supra* note 221, at art. 60. Article 61 in turn reads as follows:

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples’ Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.

Id. The text is also reproduced in HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1457 (2d. ed., 2000).

363. Democratic Republic of Congo v. Burundi, Rwanda, Uganda, Comm’n No. 227/1999, ¶ 70 (emphasis added).

364. This would be the general backdrop to the *lex specialis* dictum, which otherwise would be pointless in the matter. See *Nuclear Weapons Legality*, 1996 I.C.J. 226, ¶ 25; *Palestinian Wall*, 2004 I.C.J. 136, ¶ 106.

365. African Charter, *supra* note 221, at arts. 20, 23 (referring to the right of peoples to existence, and peace and security, respectively).

artillery a legitimate means of law enforcement, wartime killing is still a violation of the right to life, because as far as human rights are concerned, it is quite simply done discriminately, on the basis of national origin.³⁶⁷ This otherwise mind-blowing statement simply echoes in substance the fact that the African Charter counts among its specificities the absence of any provision on the state of emergency and associated derogations.³⁶⁸ If one takes seriously the fact that, first, human rights do not cease in times of war, and second, occupation is equivalent to sovereignty in functional terms, then occupation as a forcible extension of jurisdiction is a forcible extension of the operation of human rights law itself. This results in this forcible exercise of sovereignty being both a violation of human rights in itself, and additionally subject in its modalities to the operation of human rights as interpreted through the *lex specialis* (humanitarian law), which is in turn triggered by the act of extending jurisdiction across borders in such a way. This is in essence a rejection of the possibility of States having out-of-body experiences, exercising State power outside of their jurisdiction. In all cases there will be the crossing of a border and that crossing is neither a detail in international law nor meaningless to human rights themselves. The spotlight on the exceptional character of war, through a reminder that the State is a legal creature and cannot therefore exist outside of its own legal operation, makes suddenly the line of thought behind (and including) *Bankovic* very apparent as a legitimization of extra-territorial exercises of violence as State acts.

In that light, human rights do not either flatten the specificity of wartime violence into a normal operation of State coercive power or, as the case displays it well, leave unnoticed the temporary and forceful change of sovereignty over a territory. As a human rights body, the Commission actually “disapproves” of the instance of foreign occupation and finds it contrary to Article 23 of the African Charter. It seems reasonable to add that the (*jus ad bellum*) interests of the invading States would be better served within the limits of their own territory—in this case the interest in defending oneself against alleged incursions from neighboring sanctuaries.³⁶⁹ Everything starts therefore from the fact that the ousting of sovereignty is a violation of human rights, as opposed to the notion that human rights claims simply arise because of *de facto* sovereignty, without notice being taken of the *de jure/de facto* transformation being by definition a breach of some social contract somewhere, *i.e.* war. Another important example of the ramifications of the fact that the breach of *jus ad bellum* is considered (a set

366. Democratic Republic of Congo v. Burundi, Rwanda, Uganda, Commc’n No. 227/1999, ¶¶ 73–89.

367. See also, Liesbeth Zegveld and Mussie Ephrem v. Eritrea, African Comm’n on Human & Peoples’ Rights, 17th Activity Report, Commc’n No. 250/2002, AU Doc. EX.CL/279 (2003).

368. Democratic Republic of Congo v. Burundi, Rwanda, Uganda, Commc’n No. 227/1999, ¶ 76.

of) violation(s) of human rights is in this context the further conclusion that the plunder of natural resources, while also a violation of the *jus in bello* through the prohibition of pillage,³⁷⁰ is also a violation of the right of people to self-determination and in particular their permanent right to ownership over the natural resources of their legitimately sovereign territory.³⁷¹ In that last case, insisting on the continuity of human rights, and in particular the foundational right to self-determination, leads to the further important point that there are limits to the power of the *lex specialis* maxim. What is implied here by necessity is that the use of resources on occupied territory, when seen from the right to self-determination, will not be examined by the *jus in bello* if it contradicts human rights.³⁷²

From a human rights perspective, there is something importantly similar between *Bankovic* and the DRC case: jurisdiction matters. The difference is that in the former, the Court tries to reinforce some notion of formal sovereignty against its unstoppable functional alternative, whereas in the latter case the Commission signals that violation of formal sovereignty is a human rights violation that taints all further acts of the violating State as a problem. Occupation for the African Commission is illegal in itself, and we should be wary of the perversion of treating the result of a violation of international law simply in terms of “proportionality.” Extending the logic of the Chechnya cases to the DRC situation would mean discussing war-violence of that sort in terms of the proportionality of means in relation to the (implicitly) legitimate (public order) ends of the State, something that in the Chechen context was already obscene, but here would certainly rise one or two pegs along the scale of legal cynicism.

As a conclusion, one can note here that the DRC case as treated by the African Commission serves the function of reawakening human rights from the managerial slumber so well displayed by the European Court’s Chechen file. The relationship between human rights and war is one of antagonism, since human rights is ultimately a tool for the preservation and development of peace. What the DRC case points to is that the relationship between humanitarian law and human rights is mediated by sovereignty’s framing of how human rights conceive of normalcy and emergency. The application of distinction implies a situation of exceptional risk for human beings where the protection of their life is diminished by law by allowing for plausibility of being killed because of a uniform. The triggering of that situation implies the (possible, feared or actual) weakening of State structures and therefore the weakening of the frame that supports the system of human rights. The

369. Lieber Code, *supra* note 116, art. 44.

370. *Id.* at art. 93.

371. This is also implicit in the ICJ’s dealings with the right to self-determination of the Palestinian people in relationship to the “separation barrier.” But it is not in that context recognized as a reversal of the *lex generalis/lex specialis* relationship as it is posited in general terms by the Court. See *Palestinian Wall*, 2004 I.C.J. 136, ¶ 122.

importance of those State structures is recognized both by human rights law (from below) and by international law in general (from above). As such, the next obvious step would be to extend the conversation to the particular meeting point of the *jus in bello*, human rights, and the *jus ad bellum*, given that they share a central but differentiated interest in both war and sovereignty. If armed attacks are plausibly a violation of human rights, then what is the relationship between humanitarian law and armed attacks, or self-defense, for that matter, given the particular relationship of human rights to humanitarian law? The encounter between humanitarian law and human rights supports the notion that war is a legal construction attached to humanitarian law, which then explains the host of legal complications arising from too much proximity between human rights and war. Now, the question would be simply whether there is a similar relation between *jus ad bellum* and *jus in bello*, where the *jus in bello* would build its specificity both through its distant relationship with the neighboring legal field of human rights, and through its monopoly over the construction of war as war. What will remain as a background for a conversation to be had on issues of humanitarian intervention, "responsibility to protect," human security, and similar notions is that war is a legal construct attached to the forms of sovereignty, which is politically important to the distinct projects of human rights and humanitarian law.

A QUESTION OF REFRAGMENTATION

The foregoing discussion has tried to force some meaning into the formalistic distinctions that are being blurred in descriptions of humanitarian law and human rights as kin projects or related legal regimes. The relationship of human rights to humanitarian law, and a series of other formal distinctions that accompany both of them in their respective operation, are based on their different relationships to formal sovereignty and jurisdiction. The formalism of the distinction is warranted by the fact that the end of factual distinctions in contemporary conflicts (civilians/military, internal/international, private/public, and so on) can be perceived only on the basis of a backdrop constituted by a legal understanding of war, constructed on the otherwise arbitrary idea of "distinction" as a legal and a political artifact. The move to substantive, or functional, criteria yields difficulties that are therefore not only doctrinal, but also rather political, in the sense of the respective foundational principles of human rights and humanitarian law being precisely foundational. And because ultimately we are talking about war, the African Commission wakes us up from our technocratic slumber by reminding everyone that war is still a political issue and essentially a political problem, and the whole of contemporary international law beyond its technical artifices is still supposed to be dedicated to solving it. In other words, human rights and humanitarian law are deeply rooted in a political

worldview, which says something about what legitimate violence is. The delicate balance between the two bodies of law is organized around the idea of formal sovereignty and what it represents as the international legal formalization of the existence of many socially–contracted polities, who are trying to diminish the risk of violence associated with existence in a deeply assumed, and poorly assimilated, state of nature. Moving causally towards a functional or factual equivalent of the legal forms, which justify their arbitrary existence not from functional success but political theory, signifies a move towards another political universe. There is nothing inherently bad about moving from inter–governmental cooperation to global governance. It is however not “simply” a technical or even legal issue. It is a political program. It is an alternative political program to that of international law.

What matters is that, as in the casual treatment of war by human rights law, “war” can disappear from sight as a result of the dismissal of formalisms that are otherwise generated by abstract political projects, such as political liberalism and social contract theory. The disappearance of war from legal sight constitutes a normalization of the state of war in the same way as human rights helps normalize police repression of crime, and more generally, State violence as presumably legitimate within its jurisdiction. To close the ideological circle, one would therefore logically need to turn to the *jus ad bellum*’s relationship to humanitarian law, that is, the relationship between the seemingly prohibitive regulation of war’s emergence and the exceptionalist regulation of the conduct of that prohibited, yet regulated, war. Based on the foregoing, the discussion of that relationship will occur against the backdrop of human rights’ propaganda for a type of peace that is essentially the absence of war. Undoubtedly the rise of contemporary enthusiasm for humanitarian intervention will appear here as the product of an equally casual dismissal of formal distinctions for seemingly higher purposes,³⁷³ as witnessed in the expansion of the lingo of global governance with such notions as “human security” or the unavoidable “R2P.” The passing legal framework will then hopefully help us keep together, before it fades completely, the notion that war is not a natural occurrence. War is and should be in all cases a politically assumed project, in the way it is asserted in unison by Clausewitz and the St. Petersburg Declaration, and as opposed to an exercise in the management of populations, containment of risk, or moral redemption.

372. See, e.g., STUDY GROUP ON EUROPE’S SEC. CAPABILITIES, A HUMAN SECURITY DOCTRINE FOR EUROPE (2004) (presented to EU High Representative for Common Foreign and Security Policy Javier Solana in Barcelona on Sept. 15, 2004).

