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The “Crossed Judicial Scrutiny” of the European Court of Human Rights and International Court of Justice: A Plea for Reforms in Order to Enhance Coordination Between International Humanitarian Law and International Human Rights Law

Giulia Gentile*

I. Introduction

In recent years, the relationship between International Humanitarian law (“IHL”) and International Human Rights law (“IHRL”) has become the subject of increasing debate. These two branches of international law (“IL”) have very different historical origins and scopes. Notably, IHL applies to situations of armed conflict (“AC”) and grants a minimum of protection to civilians and combatants in such situations; IHRL applies without limitations to protect individuals’ rights from the States’ abuses.¹ As a consequence of their characteristics, the competence to apply these two IL branches is attributed to different bodies.²

However, the boundaries between IHL and IHRL have gradually become less defined.³ Indeed, situations falling in the scope of application of both these IL branches have significantly increased. Consequently, the necessity for the international courts not specialised in IHRL to take into account this body of law in their judgements, and *vice versa* for courts not specialised in IHL,⁴ became unavoidable. The expansion of the application of IHL and IHRL in “overlap situations”, and the consequent extension of international courts’ scrutiny over areas of IL not previously considered, generated a phenomenon which can be defined as “crossed judicial scrutiny” of international courts.⁵

The international Court of Justice (“ICJ”) and the European Court of Human Rights (“ECtHR”) provide a remarkable example of crossed scrutiny, having “expanded” their judicial assessments, respectively, in relation to IHRL and IHL. For instance, in 1996 the ICJ has considered for the first time in the *Nuclear Weapons Opinion*⁶ the applicability of IHRL in the context of AC. In the meantime, in an increasing number of cases, the ECtHR had to confront the Convention applicability in AC with IHL.⁷ As a matter of fact, the ICJ and the ECtHR

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¹ Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Edward Elgar 2014).

² See *infra*.

³ Anthony E. Cassimatis, ‘International Humanitarian Law, International Human Rights Law, And Fragmentation of International Law’, [2007] ICLQ 623.

⁴ Marko Milanovic, ‘Norm Conflicts, International Humanitarian Law, and Human Rights Law’ in Orna Ben-Naftali (ed.) *International Humanitarian Law and International Human Rights Law* (OUP 2011).

⁵ A similar idea has been expressed in Christine Byron, ‘A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies’ [2007] J. Int’l L. 839. However, the author only analysed the interpretation of IHL by IHRL bodies.

⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep. 1996*, 240 (“*Nuclear Weapons*”).

⁷ See, e.g., the Chechnyan litigation before the ECtHR, analysed in detail in William Abresch, ‘A Human Rights

crossed scrutiny have expanded the reciprocal judicial influence of these courts. Nevertheless, due to the lack of clear guidance, the current “crossed” application of IHRL and IHL has generated also significant questions on the relationship between these IL branches. As a result, legal uncertainty has risen as to the outcome of judgements requiring the application of these branches of IL, with a negative impact on the rights’ protection.

This essay will argue that the introduction of more stringent coordination mechanisms of IHL and IHRL is needed to deal with the uncertainty deriving from their “crossed” application by ECtHR and ICJ. Some possible suggestions will be presented towards (i) enhancing legal certainty; (ii) better protection of individuals’ rights, and (iii) introducing clearer guidance to potentially avoid litigation.

II. Overview of the interplay between IHL and IHRL

IHL and IHRL date back to different historical periods. IHL is one of the most ancient branches of IL, regulating the minimal guarantees and duties for the parties in the context of an AC.⁸ IHL has two core principles which are non-derogable: (i) granting protection to persons who are not, or are no longer, participating in hostilities, and (ii) restricting the right of the parties to an AC to choose methods and means of warfare.⁹ It can be affirmed that the overarching aim of IHL is to limit the negative effects of the AC in relation to the parties involved in it.¹⁰ IHL applies to both international and non-international ACs, amid the latter being subject to more limited regulation.¹¹ A number of different sources regulate this body of IL.¹² The most authoritative body competent to apply IHL is the ICJ, an international tribunal having general competence in the field of IL.¹³ It is interesting to note that IHL has some connections with IHRL, proved by the existence of derogation clauses included, generally, in IHRL Treaties, in case of exceptional situations such as war.¹⁴ However, apart from these clauses applicable to specific situations, there is no general provision for coordinating IHL and IHRL.

IHRL is an IL branch which significantly expanded in the last century. IHLR is regulated by a multitude of international Treaties, such as the International Covenant on Civil and Political

Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ [2005] Eur J Int Law 741.
⁸ Andrea Gioia, ‘The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict’ in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011).

⁹ Kolb (n 1).

¹⁰ ICRC, ‘International Humanitarian Law and International Human Rights Law’ [2003] <https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf> accessed 2 May 2016.

¹¹ Kolb (n 1).

¹² See, e.g. Geneva Convention of 28 July 1951 and Protocol Relating to the Status of Refugees of 31 January 1967 (France–Austria) (adopted 21 October 1974, 24 July 1975) 985 UNTS 303.

¹³ John R. Crook, ‘The International Court of Justice and Human Rights’ [2004] NW. U J. Int’l Hum. Rts. 1. Although it has general competence within the field of IL, the ICJ is taken as a model since it has developed significant case-law on IHL but it is not a IHRL-specialised court. Indeed, since its establishment the ICJ has considered the application of IHRL in few instances, being a court mainly competent to judge inter-state cases. In such type of litigation, IHRL is not usually involved, *see infra*.

¹⁴ For an overview on the derogations provided under IHRL, Emilie M. Hafner-Burton et al, ‘Emergency and Escape: Explaining Derogations from Human Rights Treaties’ [2011] IO 673.

Rights, the UN Charter and the European Convention on Human Rights. In particular, the European Convention on Human Rights (“ECHR” or “Convention”), issued in the 1950 in the aftermath of the Second World War, is the main European IHRL Treaty.¹⁵ Such a Treaty provides obligations for the signatory States towards individuals, and, therefore, has mainly vertical effects.¹⁶ In addition, one of the novelties introduced by the ECHR is that the nationality is not a requirement to its enforcement. Therefore, individuals who are not citizens of signatory States may file claims for ECHR violations committed against them by a signatory State. In order to enforce this Convention, in 1959 the ECtHR was established to monitor compliance with the ECHR. The role of this court has been fundamental in spreading a culture based on human rights, as proved by the increasing number of ECHR Contracting Parties since its establishment.

As pointed out by Gioia,¹⁷ these IL bodies have significant differences. First of all, they bind different entities: IHL binds each party to the conflict, *i.e.* State and non-State actors, while IHRL generally binds only States. Secondly, while IHL applies, in theory, to international situations such as ACs, IHRL was established as an internal State affair.¹⁸ Another divergence is that IHL is non-derogable, with the only exception of Art. 5 of the Fourth Geneva Convention, whereas IHRL is derogable as proved by different derogation clauses contained in the treaties (*e.g.*, Art. 15 ECHR).¹⁹

Even though IHL and IHRL seem to be distinct systems with minor connections, in the last years they have shown a closer relationship.²⁰ Indeed, in some of its opinions, the ICJ had to deal with the applicability of IHRL in situations of ACs, which are generally regulated by IHL; at the same time, claims have started to be filed to the ECtHR for breaches of IHL, jointly with alleged ECHR violations.²¹ Therefore, these courts had begun to consider the application of IL branches not directly falling within their “consolidated” judicial scrutiny, as to the ICJ, or within their competence, as to the ECtHR. This situation can be defined as “crossed judicial scrutiny” of international courts.

III. Crossed scrutiny of the ICJ as to IHRL

The *Nuclear Weapons*²² Opinion is the first case in which ICJ exerted its crossed scrutiny as to IHRL. This opinion regarded the lawfulness of nuclear weapons’ use under IHL. The parties

¹⁵ Gioia (n 8).

¹⁶ *Ibid.*

¹⁷ Gioia (n 8) 202.

¹⁸ *Ibid.* However, the ECtHR has affirmed the extra-territorial application of the ECHR. For instance, *Bankovic and Others v. Belgium* App. no. 52207/99 (ECtHR, 12 December 2001).

¹⁹ Juliet Chevalier-Watts, ‘Has human rights law become *lex specialis* for the European Court of Human Rights in right to life cases arising from internal armed conflicts?’ [2010] *The International Journal of Human Rights* 584.

²⁰ Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP 2010).

²¹ *Ibid.*; Eriko Tamuro, ‘The Isayeva Cases of the European Court of Human Rights: The Application of International Humanitarian Law and Human Rights Law in Non-International Armed Conflicts’ [2011] *Chinese JIL* 129.

²² *Nuclear Weapon* (n 6).

argued that the use of these means conflicted with IHRL provisions, notably Art. 6 ICCPR (right to life).

As a matter of fact, the ICJ has a general competence to apply IL, but is not a tribunal specialised in IHRL. As highlighted by Crook,²³ the ICJ's competence within this field is limited by several factors. As mentioned, the court is competent to adjudicate on litigations between State-entities.²⁴ This entails that the typical vertical situations protected by IHRL are rarely considered by the ICJ.²⁵ Although Art. 36 of its Statute seems to provide the possibility for individuals to file cases to this court, the ICJ has been very rarely required to adjudicate on IHRL matters.²⁶

However, in that opinion the court did not object to the analysis of the relationship between IHL and IHRL. With reference to Art. 6 ICCPR the ICJ argued, first, that it applies also in situations of AC and, second, that IHL-IHRL relationships are based on the *lex specialis* principle.²⁷ The latter statement implies that, in situations of AC, IHL should prevail, as a specialised rule, over IHRL. However, as pointed out by Milanovic,²⁸ this principle was applied by the ICJ only in relation to a specific provision. In addition, IHRL bodies have never explicitly acknowledged IHL as *lex specialis* in AC situations.²⁹ Therefore, it is highly questionable whether this principle is a general rule for coordinating the relationship between IHL and IHRL.

This ICJ position seems to have changed with the *Palestinian Wall Opinion*.³⁰ Indeed, the ICJ stated that “*some rights may be exclusively matters of IHL; others may be exclusively matters of IHRL; yet others may be matters of both these branches of international law*”.³¹ This interpretation, which may be defined as the “influence sphere theory”, has also recently been confirmed in the *Congo* judgment.³² Unsurprisingly, this statement has been highly criticised³³ since it introduced even less clear guidance on the relationship between these IL branches. On the basis of the ICJ's statement, it is in fact not possible to identify which provisions should prevail in an overlap situation. It is evident that the ICJ failed to provide

²³ Crook (n 13) 5.

²⁴ Statute of the International Court of Justice, available at <http://www.icj-cij.org/documents/?p1=4&p2=2>.

²⁵ Crook (n 13) 3.

²⁶ *Ibid.*

²⁷ The *lex specialis* is a general principle of interpretation of the Treaties. For an overview of the principle from the perspective of international law, see ILC Study Group on Fragmentation (2006a), 30-114.

²⁸ Marko Milanovic, ‘A norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law’ [2010] *Journal of Conflict & Security Law* 459.

²⁹ For instance, the UN Human Rights Commission has only recognised the complementary nature of these two IL branches. See UN, ‘International Legal Protection of Human Rights in Armed Conflict’ [2011] <http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf> accessed 2 May 2016.

³⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 2004*, 136 (“*Palestinian Wall*”).

³¹ *Ibid.*, para. 106.

³² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), judgment, ICJ Rep. 2005*, 168 (“*Congo*”), para. 216.

³³ Milanovic (n 28); Silvia Borelli, ‘Mis-(use) of General Principles of Law: *Lex specialis* and the Relationship between International Human Rights Law and the Laws of Armed Conflict’ in L. Pineschi (ed.), *General Principles of Law: The Role of the Judiciary* (Springer, 2015).

effective guidance on this point. However, through its judgments, the court showed its openness towards IHRL and excluded any doubt about the mutual exclusivity of the two systems.³⁴

IV. Crossed scrutiny of the ECtHR as to IHL

As to the ECtHR, this court has limited competence compared to ICJ, being the highest tribunal of the ECHR system entrusted with the duty of monitoring the Contracting Parties' compliance with the Convention. Therefore, it is an IHRL-specialised court. Despite its specific competence, the ECtHR has had to consider the IHL increasingly in its judgments. Indeed, a growing number of claims for breaches of the Convention in the context of ACs have been filed to the ECtHR. Thus, the court started delivering judgements for AC situations which generally fall under the scope of the IHL. Two phases can be identified in the ECtHR's case-law as to IHL scrutiny.

The first phase is characterised by a high degree of reticence toward this “foreign” IL branch. For instance, in *Isayeva*³⁵ the issue arose from the killing of a number of civilians following an aerial missile attack by Russian military planes. Although the applicants invoked IHL provisions (*i.e.* Art. 3 Geneva Conventions), the ECtHR did not apply IHL to the matter, nor provided any guidance as to its relationship with the Convention. However, the court used some IHL language in its decision.³⁶ As shown by this judgement, the first cases in which the ECtHR had to consider the applicability of IHL provide no clear evidence as to the role played by IHL in the ECtHR case-law. Indeed, although the ECtHR adopted some IHL language, it still omitted to explicitly refer to this body of law.³⁷ Consequently, various theories have been developed on the “reticent application” of IHL by ECtHR.

Forowicz³⁸ demonstrated that the ECtHR has indirectly taken into account IHL in many judgments,³⁹ although without directly applying it. At the same time, this author argued that the ECtHR is willing to harmonise IHL and IHRL. Nevertheless, it may be affirmed that Forowicz's theory is only partially founded if we consider the persistent lack of explicit reference to the IHL in many ECHR decisions.⁴⁰ Other authors slightly disagree with Forowicz's position by affirming that the ECtHR indirectly applies IHL, but without any harmonization purpose. As an example, Gioia⁴¹ justifies the ECtHR's cautious attitude towards IHL since most of the cases considered by the court are non-international AC, for which there are doubts also under IHL concerning the protection thresholds to be triggered. Finally, some

³⁴ Gioia (n 8), Milanovic (n 28).

³⁵ *Isayeva v. Russia* App. no. 57950/00 (ECtHR, 24 February 2005) para 157.

³⁶ Tamuro (n 21).

³⁷ Forowicz (n 20).

³⁸ Forowicz (n 20).

³⁹ See for instance *Güleç v Turkey* App No 21593/93 (ECtHR, 27 July 1998) paras 63–64.

⁴⁰ Siobhan McInerney-Lankford, ‘Fragmentation of International Law Redux: The Case of Strasbourg’ [2012] *Oxford Journal of Legal Studies* 609, 632.

⁴¹ Gioia (n 8).

academics have theorised that the ECtHR completely disregards IHL. Pinzauti⁴² argued that in the *Kononov*⁴³ the ECtHR failed to take into account IHL, in particular, the different protections granted to civilians and prisoners of war (“PoW”) under IHL, and therefore delivered an incorrect judgement.

The reticent attitude of the ECtHR towards IHL has started to change with the *Varnava*⁴⁴ case. Indeed, the court established that Art. 2 ECHR should “*be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law*”.⁴⁵ Thus, it appears that the ECtHR has not only made an express reference to IHL, but has also affirmed that a specific norm of the ECHR (*i.e.* Art. 2 ECHR - the right to life) had to be interpreted in accordance with it. Therefore, this judgement has been considered as the first step of the ECtHR towards direct application of IHL.⁴⁶ Finally, in *Hassan*, it seems that the ECtHR not only directly interpreted IHL, but also indirectly recognised the *lex specialis* principle expressed by the ICJ. Indeed, having recalled a number of IHL provisions, the court relied on Arts. 43 and 78 of the Fourth Geneva Convention to interpret Art. 5 ECHR.⁴⁷

These recent judgements show a new trend in the ECtHR’s attitude towards IHL. While in its earlier judgements the ECtHR avoided any reference to IHL, in the most recent ones, the court has demonstrated a more open attitude as to IHL, by applying it as an interpretative tool of ECHR’s provisions in AC situations. Nevertheless, the ECtHR still remains silent as to the systemic relationship between IHRL and IHL. Overall, although progressively becoming more receptive to IHL, the ECtHR left open the question on the delimitation of the borders between IHL and IHRL.

V. Findings on the crossed scrutiny of ECtHR and ICJ

On the basis of the above analysis, the main findings are as follows:

- (i) the ICJ acknowledged the IHRL’s application in situations of AC pursuant to the *lex specialis* principle or the division of influence sphere theory;
- (ii) the ECtHR is increasingly taking into account IHL as an interpretative instrument for the ECHR application in AC situations.

How should these principles be applied in order to regulate the interplay of IHL and IHRL in overlap situations? Practical examples of the implications deriving from the crossed scrutiny

⁴² Giulia Pinzauti, ‘The European Court of Human Rights’ Incidental Application of International Criminal Law and Humanitarian Law’ [2008] JICJ 1043, p. 1045.

⁴³ *Kononov v. Latvia* App. no. 36376/04 (ECtHR, 24 July 2008).

⁴⁴ Alexandre Sicilianos, ‘L’Articulation Des Droits De L’Homme Et Du Droit International Humanitaire Dans La Jurisprudence De La Courredh Strasbourg’ (Strasbourg, 2015).

⁴⁵ *Varnava and Others v. Turkey*, App. no. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009), para. 185.

⁴⁶ Joana Abrisketa Uriarte, ‘The Problems the European Court of Human Rights Faces in Applying International Humanitarian Law’ in Pat Gibbons and Hans-Joachim Heintze (ed) *The Humanitarian Challenge*, (Springer 2015).

⁴⁷ *Hassan v. The United Kingdom* App. no. 29750/09 (ECtHR, 16 September 2014).

of the ECtHR and ICJ will demonstrate that the judgements' outcome could be significantly different in overlap situations by applying the judicial practice developed by each of these courts. Therefore, more stringent mechanisms of coordination are needed in order to better regulate the IHL-IHRL interplay, enhance legal certainty, avoid potential irresolvable normative conflicts, and reinforce the judicial protection of individuals' rights.

VI. Critical assessment of the current “crossed scrutiny” of the ICJ and ECtHR

In the absence of clear guidance from the Treaties, the current “blurred” approaches of the ICJ and ECtHR to IHRL and IHL have *de facto* provided these courts with the opportunity to influence the interpretation of branches of IL not considered in their judgements in the past. As shown above, through their case-law, these courts have expanded their judicial scrutiny and, therefore, their judicial review powers in further IL branches. However, this judicial scrutiny's expansion in other areas of IL did not correspond to enhanced legal certainty. To give an illustration, let's consider an overlap situation between IHL and IHRL in the context of AC, where a breach of lawful detention (Art. 5 ECHR) is alleged. According to IHL, when a PoW is detained, there is no right to effective judicial review of the imprisonment. However, effective judicial review is one of the requirements for lawful detention under Art. 5 ECHR.

In order to resolve this type of conflict, two principles are available according to the ICJ's case-law, the *lex specialis* principle and the influence spheres of IHL and IHRL.⁴⁸ With regards to the *lex specialis*, even if we assume that this principle is the best tool to regulate the interplay of IHL and IHRL and that the ECtHR indirectly acknowledges it through its case-law, it is not apt to resolve overlap situations between IHL and IHRL. As argued by Borelli,⁴⁹ the unsurmountable obstacle for an effective *lex specialis* application to IHL and IHRL is that there is no relationship of *ejusdem generis* between these IL branches. Indeed, there is no legal basis to affirm that IHL is a *species* of the IHRL *genus* or *vice versa*. As a matter of fact, though IHRL and IHL have similar objectives, they still remain two different bodies of law. Therefore, a relation of “belonging” between IHL and IHRL, required in order to apply the *lex specialis* principle, is not met. Furthermore, although Milanovic⁵⁰ demonstrated that such a principle could help judicial interpretation, it cannot be used as interpretative tool to create hierarchies where they do not exist, like in the case of IHL and IHRL. As a conclusion, it may be argued that the *lex specialis* principle is not the most effective instrument to identify the applicable provision of IHL or IHRL in overlap situations.⁵¹

The influence sphere theory of the ICJ might have a significant role in determining the jurisdiction of the ICJ and the ECtHR. It is based on a sort of judicial restraint theory according to which the courts should look at the sphere of application of specific provisions of IHL and

⁴⁸ The very fact that the ICJ has adopted different approaches as to the relationship between IHL and IHRL shows the lack of clear guidance, see *infra*.

⁴⁹ Silvia Borelli, (n 33) 24.

⁵⁰ Marko Milanovic, ‘Norm Conflicts, International Humanitarian Law and Human Rights Law’ in Orna Ben-Naftali (ed), *Human Rights And International Humanitarian Law* (OUP 2010).

⁵¹ *Ibid.* 4

IHRL. At the same time, for an effective application of this theory, more defined competence rules for the ICJ and the ECtHR established by the States in international agreements would be needed.⁵²

As a conclusion, the ICJ's case-law did not ultimately contribute to define the relationship between these branches of IL and cannot effectively be used to solve the interplay of IHL and IHRL in overlap situations.⁵³

From the ECtHR's case-law, there are no specific principles provided by the court in order to solve normative conflicts in overlap situations. Indeed, the ECtHR does not follow any specific interpretative criteria when dealing with IHL, but instead, grounds its interpretation on a case-by-case basis. Furthermore, since the ECtHR never expressly limited its judicial interpretation of other IL branches, some authors have argued that the approach of this court could entail the risk of watering down these law systems.⁵⁴

Thus, by applying the current crossed scrutiny of the ICJ and the ECtHR, the risk of fragmentation and watering down the two systems reveals to be real.⁵⁵ This concern is further strengthened by the fact that conflicting judgements are indeed possible. As suggested by Milanovic,⁵⁶ a potential irresolvable normative conflict between IHL and IHRL is related to Art. 43 of The Hague Regulation, which imposes to the occupying State the respect of the national local law. The author illustrates the case in which a local law imposes stoning as punishment for adultery, which would be incompatible with Art. 3 ECHR. In such a scenario, it is not unlikely that the ICJ would apply Art. 43 of The Hague Regulations, while the ECtHR would rule for the application of Art. 3 ECHR.

As a result, the current status of applications of IHL and IHRL by the ECtHR and ICJ is not satisfactory as it increases normative conflicts, enhances the legal uncertainty and ultimately affects the protection of individuals' rights. Notably, when an overlap situation between IHL and IHRL arises, in absence of clear guidance on the rule to be applied, the protection of individuals' human rights could succumb against the interest of the States involved in the litigations. In the mentioned example on the right to effective judicial protection for PoWs, for instance, the individual's right to obtain a fair process could be superseded by the interest of the Contracting Parties to avoid litigation and pursue their warfare strategies.

The lack of a uniform approach by the ICJ and the ECtHR as to the application of these two IL branches may be due to multiple causes, such as political (in-)decision of the Contracting Parties, or the lack of an express mandate of these courts to effectively exert their scrutiny in other IL branches. Another possible reason could be a competitive relationship between these

⁵² See *infra*.

⁵³ However, cfr. *Al-Jedda v. United Kingdom* App. no. 27021/08 (ECtHR, 7 July 2011).

⁵⁴ See for Instance Jelena Pejic 'The European Court of Human Rights' *Al-Jedda* judgement: the oversight of international humanitarian law' [2011] *International Review of the Red Cross*, 837.

⁵⁵ Forowicz (n 20).

⁵⁶ Milanovic (n 28) 470.

courts, nurtured by the fear of losing authority when engaging in dialogue with other international courts.⁵⁷

In order to resolve the aforementioned issues, it is suggested that these courts should use more effective methods to better identify the boundaries between these two IL branches and coordinate their judicial scrutiny. It is suggested that these mechanisms would be able to solve the lack of coordination between IL branches as well as between these international courts.

VII. A plea for introducing more effective coordination mechanism between IHL and IHRL and the scrutiny of ECtHR and ICJ

On the basis of the above analysis, it may be argued the lack of clarity on the interplay of these two IL branches resulting from the case-law of the ECtHR and ICJ entails absence of legal certainty and reduced rights' protection. To redress these inefficiencies, academics have already proposed possible alternatives to the current interpretative methods of the ECtHR and the ICJ. Nevertheless, these suggestions have only considered approaches which revealed to be ineffective to provide actual guidance on the relationship between IHL and IHRL.

For example, a proposed solution is the application of other principles of IL, such as the *lex posterior*,⁵⁸ according to which the most recent norm prevails over the earlier one. However, this principle would not be easily compatible with the political intentions of the Contracting Parties and would entail the same problems of *lex specialis*. As a matter of fact, this principle would inevitably create a hierarchy between IHL and IHRL norms according to the date of the entry in force of the different provisions. At the same time, it seems unrealistic that the Contracting Parties were expecting for such a hierarchical interaction between IHL and IHRL when entering into the respective international Treaties. Another proposed solution is a stricter enforcement of the derogation clauses included in the Treaties,⁵⁹ such as Art. 15 ECHR. Subsequently, States should derogate a specific body of law (generally IHRL) to avoid any possible conflicts between different IL bodies of law. This solution has proved to be of limited effectiveness for a number of reasons: First, the derogation clauses apply only to very limited situations; second, the States have very rarely entered into such derogations;⁶⁰ third, the scrutiny of the competent judicial bodies to verify the lawfulness of the derogation generally "discourages" the States to enter in such derogations.⁶¹ For these reasons, the derogation clauses alternative does not seem effective either, being too political and too less legal. Thus, it is suggested that more stringent mechanisms should be put in place to coordinate the scope of IHL and IHRL, and, consequently, the competences of the ECtHR and the ICJ.

⁵⁷ Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP 2003).

⁵⁸ Andrew Clapham, Paola Gaeta, Marco Sassòli, *The 1949 Geneva Conventions: A Commentary* (OUP 2015).

⁵⁹ See for instance, Julian M. Lehmann, "Limits to Counter-Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights" available at <<http://projects.essex.ac.uk/ehrr/V8N1/Lehmann.pdf>>.

⁶⁰ Hafner-Burton (n 14) 673. In fact, in order to enter into a derogation, States should recognise the existence of an "emergency situation", which could affect the national and international State's reputation.

⁶¹ *Ibid.*

A more effective mechanism of coordination between IHL and IHRL could be the establishment of defined competences between courts. For instance, ICJ's competence may be more clearly identified and/or limited to specific areas of IL and the ECtHR could refrain from applying other IL's branches. As a result, these two courts would be compelled to follow the interpretation provided by the other one in relation to "foreign" branches of IL. However, this solution is highly complex and barely applicable. Indeed, it would require reforms of the existing treaties and the enforcement of "communication mechanisms" between courts. A potential communication mechanism could be the creation of "preliminary rulings" procedures to obtain the interpretation of specific concepts of "foreign" branches of IL. Through this system, these courts could reciprocally ask for the interpretation of other IL branches' norms to be applied in a pending case before them. Such a procedure may have the reverse effect to possibly lengthen the pending proceedings, and, therefore, to grant less effective judicial protection to the parties involved. Nevertheless, if accompanied by an accelerated interpretation mechanism, as in the CJEU procedure,⁶² this solution could enhance coherence and coordination between courts and IL branches, by granting more effective protection especially in relation to fundamental rights.

Other "softer solutions" are available to better coordinate IHL and IHRL, such as comity mechanisms or judicial self-restraint practices. As a possible comity mechanism for competing international courts, Giorgetti⁶³ suggests the establishment of a judicial comity. A virtuous example was provided in the *Yukos* case.⁶⁴ In this litigation, the several international tribunals involved seriously took into account the judgements of other judges, and were therefore able to avoid conflicting decisions. Similarly, the ECtHR and the ICJ could try to "be more conscious" of the other court's judgments and follow them more strictly when faced with overlap situations. Finally, these courts could also exercise more effective judicial restraint, by avoiding the analysis of interpretative questions requiring the application of multiple branches of IL. In this way, the courts would not "invade" areas of IL which have always fell within the direct scrutiny of other judicial bodies. If this solution were applied by ICJ and ECtHR, it would have the positive effect to significantly limit the risk of frequent overlaps between IHL and IHRL. As a negative effect, this approach could entail significant lack of judicial protection.

The intermediate solution of enhanced judicial dialogue between ICJ and ECtHR may resolve significant issues deriving from the current blurred border between IHL and IHRL. This method would indeed not require any Treaty amendments or any agreement among the States, but could be established simply on the basis of courts' practice. At the same time, this option presents significant limits when compared to the preliminary ruling mechanisms.

As shown by the EU legal system, through a direct horizontal dialogue between courts, the

⁶² Art. 107, Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013).

⁶³ Chiara Giorgetti, 'Horizontal and Vertical Relationships of International Court and Tribunals – How Do We Address Their Competing Jurisdictions?' [2015] ICSID 98.

⁶⁴ *Ibid.* 115.

harmonization of different legal systems, *i.e.* national laws and the EU law, was reached in the EU. Notably, Slaughter⁶⁵ has demonstrated that national and EU law influenced each other and penetrated in the other legal system through judicial dialogue.⁶⁶ The peculiarity of this model is that the relationship between the CJEU and the national court is not based on a hierarchical structure. Indeed, while the CJEU is the EU highest court in charge of interpreting EU law, national courts may decide or not to “dialogue” with the former through the preliminary ruling procedure when a question on the interpretation or the validity of EU law relevant to a national litigation arise.⁶⁷ Without the national judges’ input, the CJEU would not be able to interpret the EU law to be applied in the national litigation. This shows that the relationship between the EU and national judicial systems is conformed to collaborative and cooperative practices between judges. This model explains that the CJEU was highly influenced by national law when interpreting EU law⁶⁸ in order to provide effective solutions for national judges and, subsequently, the latter accepted to apply the EU law interpretation provided by the CJEU in the litigations pending before them. Thus, it may be argued that the collaboration between EU and national judges, as realised via the preliminary ruling procedure, made possible the mutual communication between the (potentially conflicting) EU and national legal systems. Another positive consequence of the EU model is that this body of law has reached higher uniform application in the Member States.⁶⁹

The virtuous EU model and its potential positive effects on the uniformity of IL should not be *a priori* excluded to regulate the relationships between IHL and IHRL, and, thus, ICJ and ECtHR. It is submitted that, through a preliminary ruling mechanism, the authority and the autonomy of IHL and IHRL, and their respective competent courts, would be preserved.

VIII. Conclusion

Through this study, it has been demonstrated that the relationship between IHL and IHRL has become less defined in recent years. Notably, this situation is caused by the current crossed interpretation of IHL and IHRL by the ECtHR and ICJ respectively. These courts, the ICJ being a court with general competence in IL but not specialised in IHRL and the ECtHR being a court specialised in IHRL, have not been able to provide any clear guidance on the interplay between IHL and IHRL in overlap situations. The analysis of the implications deriving from the crossed scrutiny of the ICJ and ECtHR has shown actual “confusion” as to the identification of the applicable provisions in situations falling under the scope of IHL and IHRL. The

⁶⁵ Anne-Marie Slaughter ‘Human Rights International Law Symposium: Article: A Typology of Transjudicial Communication’ [1994] U. Rich. L. Rev 1.

⁶⁶ It is worth mentioning that relationship between EU law and national law is governed by the principle of supremacy of EU law over national law. However, this has not avoided significant influence of national law on EU law, see *infra*.

⁶⁷ According to Art. 267(1) TFEU, national judges have the discretion to submit a preliminary ruling request to the CJEU when a question on the interpretation or the validity of EU law arises. However, Art. 267(3) also imposes a duty to the national court of last instance to refer preliminary questions to the CJEU when the interpretation of EU law is necessary to adjudicate on a pending case. For further details on the preliminary procedure, see Trevor Hartley, *The Foundations of European Union Law* (OUP, 2015).

⁶⁸ See for instance Case C-36/02 *Omega v. Oberburgermeisterin* [2006] ECLI:EU:C:2004:614.

⁶⁹ Paul Craig and Graienne de Burca, *EU Law* (6th ed., OUP 2015), 298.

consequences of these settings are (i) an increase of legal uncertainty as to the outcome of the cases; (ii) the reduction of effective judicial protection of rights and; (iii) the enhancement of IL fragmentation. To redress these issues, it has been suggested that these courts should use more effective mechanisms in order to better coordinate IHL and IHRL without establishing any judicial hierarchy, such as (i) preliminary request mechanisms; (ii) enhanced comity dialogue; (iii) judicial self-restraints practices.