



The Effects of International Human Rights Law on other Branches of Public International Law:

An Annotated Compilation of Case Law





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Table of contents

THE EFFECTS OF INTERNATIONAL HUMAN RIGHTS LAW ON OTHER BRANCHES OF PUBLIC INTERNATIONAL LAW I

THE EFFECTS OF INTERNATIONAL HUMAN RIGHTS LAW ON INTERNATIONAL INVESTMENT LAW 5

1.	URBASER S.A. AND CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BISKAIJA UR PARTZUERGOA V. THE ARGENTINE REPUBLIC	5
2.	MONDEV INTERNATIONAL LTD V. UNITED STATES OF AMERICA	9
3.	TÉICAS MEDIOAMBIENTALES TECMED, S.A. V. MEXICO	11
4.	SAIPEM SPA V. BANGLADESH	13
5.	LOAN MICULA, VIOREL MICULA, S.C. EUROPEAN FOOD S.A., S.C. STARMILL S.R.L. AND S.C. MULTIPACK S.R.L. V. ROMANIA	14
6.	PHOENIX ACTION, LTD. V. THE CZECH REPUBLIC	15
7.	SUEZ, SOCIEDAD GENERAL DE AGUAS DE BARCELONA S.A. AND VIVIDENI S.A. V. ARGENTINA	16
8.	GRAND RIVER ENTERPRISES SIX NATIONS, LTD., ET AL. V. UNITED STATES OF AMERICA	17
9.	SPYRIDON ROUSSALIS V. ROMANIA	18
10.	HESHAM TALAAT M. AL-WARRAQ V. REPUBLIC OF INDONESIA	18

THE EFFECTS OF INTERNATIONAL HUMAN RIGHTS LAW ON INTERNATIONAL HUMANITARIAN LAW 20

1.	MAPIRIPAN MASSACRE V. COLOMBIA	20
2.	COARD ET AL V. UNITED STATES	23
3.	HASSAN V. THE UNITED KINGDOM	26
4.	PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL AND OTHERS V. GOVERNMENT OF ISRAEL AND OTHERS	28
5.	LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY	30
6.	SANTO DOMINGO MASSACRE V. COLOMBIA	31
7.	JUAN CARLOS ABELLA V. ARGENTINA	33
8.	THE AFRO-DESCENDANT COMMUNITIES DISPLACED FROM THE CACARICA RIVER V. COLOMBIA	36
9.	CYPRUS V. TURKEY	37
10.	ISAYEVA V. RUSSIA	39

THE EFFECTS OF INTERNATIONAL HUMAN RIGHTS LAW ON INTERNATIONAL CRIMINAL LAW 41

1.	PROSECUTOR V. TADIĆ	41
2.	PROSECUTOR V. KUPREŠKIĆ	45
3.	PROSECUTOR V. ZEJNIL DELALIC ET AL.	48
4.	PROSECUTOR V. AKAYESU	51
5.	PROSECUTOR V. FURUNDŽIJA	53
6.	PROSECUTOR V. NAHIMANA ET AL.	56
7.	PROSECUTOR V. KATANGA AND CHUI	59
8.	PROSECUTOR V. KUNARAC, KOVAČ AND VUKOVIĆ	62
9.	PROSECUTOR V. ALEKSOVSKI	65
10.	PROSECUTOR V. JEAN BOSCO BARAYAGWIZA, DECISION	66

THE EFFECTS OF INTERNATIONAL HUMAN RIGHTS LAW ON INTERNATIONAL TRADE LAW 70

1. OMEGA SPIELHALLEN-UND AUTOMATENAUFSSTELLUNGS-GMBH V. OBERBÜRGERMEISTERIN DER BUNDESSTADT	70
2. EUGEN SCHMIDBERGER INTERNATIONALE TRANSPORTE PLANZUGE V. REPUBLIK ÖSTERREICH	71
3. VEREINIGTE FAMILIAPRESS ZEITUNGSVERLAGS-UND VERTRIEBS GMBH V. HEINRICH BAUER VERLAG	73
4. EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS	74
5. THAILAND – RESTRICTIONS ON IMPORTATION OF AND INTERNAL TAXES ON CIGARETTES	75
6. BRAZIL – MEASURES AFFECTING IMPORTS OF RE-TREADED TYRES	76
7. UNITED STATES – STANDARDS FOR REFORMULATED AND CONVENTIONAL GASOLINE	78
8. EUROPEAN COMMUNITIES - MEASURES CONCERNING MEAT AND MEAT PRODUCTS	79
9. EUROPEAN COMMUNITIES – MEASURES PROHIBITING THE IMPORTATION AND MARKETING OF SEAL PRODUCTS	80
10. CHINA – MEASURES AFFECTING TRADING RIGHTS AND DISTRIBUTION SERVICES FOR CERTAIN PUBLICATIONS AND AUDIOVISUAL ENTERTAINMENT PRODUCTS	83

THE EFFECTS OF INTERNATIONAL HUMAN RIGHTS LAW ON INTERNATIONAL ENVIRONMENTAL LAW 85

1. CLAUDE REYES ET AL. V. CHILE	85
2. TAŞKIN AND OTHERS V. TURKEY	87
3. DUBETSKA AND OTHERS V. UKRAINE	88
4. ÖNERİYILDIZ V. TURKEY	90
5. THE SOCIAL AND ECONOMIC RIGHTS ACTION CENTRE AND CENTER FOR ECONOMIC AND SOCIAL RIGHTS V. NIGERIA	92
6. SARAKAKA PEOPLE V. SURINAME	93
7. MAYA INDIGENOUS COMMUNITY OF TOLEDO DISTRICTS V. BELIZE	94
8. GABCIKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA), SEPARATE OPINION OF JUDGE WEERAMANTRY	95
9. URGENDA FOUNDATION V. THE STATE OF NETHERLANDS	97
10. PULP MILLS ON THE RIVER URUGUAY (ARGENTINA V. URUGUAY), DISSENTING OPINION OF CAÑADO TRINDADE	98

Acronyms:

AC: Appeals Chamber

ACHR: American Convention on Human Rights

BIT: Bilateral Investment Treaty

CESR: Center for Economic and Social Rights

EC: European Communities

ECHR: European Convention on Human Rights

ECJ: European Court of Justice

ECtHR: European Court of Human Rights

GATT: General Agreement on Tariffs and Trade

GC: Geneva Convention

GSP: Generalized System of Preferences

HRC: Human Rights Committee

IAC: International Armed Conflict

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICJ: International Court of Justice

ICL: International Criminal Law

ICRC: International Committee of the Red Cross

ICSID Convention: International Convention on Settlement of Investment Disputes

ICSID: International Center for Settlement of Investment Disputes

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the Former Yugoslavia

IHL: International Humanitarian Law

IHRL: International Human Rights Law

IIL: International Investment Law

ILO: International Labour Organization

ITL: International Trade Law

NAFTA: North American Free Trade Agreement

NIAC: Non International Armed Conflict

OHCHR: Office of the United Nations High Commissioner for Human Rights

OIC Agreement: The Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference

OTP: ICC Office of the Prosecutor

PKK: Kurdistan Workers' Party

PTC: Pre-Trial Chamber

SERAC: The Social and Economic Rights Action Centre

SPS Agreement: The Agreement on the Sanitary and Phytosanitary Measures

TBT Agreement: The Agreement on Technical Barriers to Trade

TC: Trial Chamber

UDHR: Universal Declaration on Human Rights

UNCITRAL: The United Nations Commission on International Trade Law

VCLT: Vienna Conventions on the Law of Treaties

WTO: World Trade Organization

The Effects of International Human Rights Law on other Branches of Public International Law

Introduction

Human rights are entrenched in international law. They are often regarded as one of the fundamental values of the international legal order. Human rights in international law have multiple sources. They figure, significantly, in international law treaties, both global and regional and in some cases, they are customary international law, or constitute general principles of law. International human rights law (IHRL) is also regarded as a specialised branch of international law. Through regional human rights courts, United Nations quasi-judicial bodies and domestic courts, IHRL interpretations specify the scope of legal human rights and corresponding state duties together with the fine-grained conditions for the legitimate restrictions of human rights.

The central focus of international human rights law as a sub-branch of international law is the specification of duties of states in the treatment of individuals within their jurisdiction. IHRL jurisprudence is built upon cases brought by individuals that claim individual rights violations in specific cases. Given the lack of a constitution in the international legal order, the extent to which human rights law underpin interpretation in other branches of international law is often underdetermined. While a limited number of human rights provisions (notably the freedom from torture and prohibition of slavery) have been regarded as *jus cogens* norms, international human rights law *tout court* does not enjoy a higher hierarchical place formally with respect to the rest of international law. It is also not clear whether the sole role of IHRL in international law is to act as trump cards in relation to principles and purposes in other branches of international law. IHRL does fulfil a diverse range of functions in the international legal order. These include the enabling of coherent interpretation, filling gaps in other branches of international law, providing a humanised interpretation of international law (that is, to bring in an interpretative focus to the overall interpretation of international law based on the centrality of human rights of individuals) and to progressively develop international law.

As a contribution to wider studies on the contribution and place of IHRL within international law, this reader surveys the effects of IHRL on five other branches of international law (international criminal, international environmental, international humanitarian, international investment and international trade law) through selected cases. It does so by investigating how IHRL, as a fundamental principle, a list of rights and as a set of jurisprudential doctrines informs and shapes interpretation in other domains of international law. The reader aims to capture the diverse range of normative effects of IHRL on judicial decision-making on other branches of international law, ranging from offering general interpretative guidance to aiding the development of another branch, from influencing competing interests, to displacing existing standards and from

specifying an existing standards to acting as gap filler in another body of international law. We recognise that the relationship between IHRL and other branches of international law may be dealt with in law and policy making forums, that do not have judicial functions. This relationship, of course, is also part of sustained academic scholarship. Whilst courts are not the only site for negotiating the relationship between IHRL and other branches of international law, they, however, remain central because they focus on 'legal' effects and because they are capable of informing debates outside of the judicial context.

The reader does not take 'effect' to mean a positive effect or a 'human rights friendly' effect on the outcome of adjudication at all times. In the case law, the effects of IHRL can be found at the stage of argumentation by one of the parties to the dispute, the main part of the judgment or in *obiter dicta* or in dissenting opinions.

The reader shows that the extent of effects of IHRL on other branches of international law is mediated by both institutional and normative factors.

Institutionally, not all branches of international law have permanent courts or authoritative interpretive bodies. In other words, there is no forum to receive the effects of IHRL, save in the case of the International Court of Justice. In addition, human rights courts often emerge as the key sites for explicitly formulating the effects of IHRL on other branches. In international humanitarian law and international environmental law this is particularly the case. This subsuming of another branch in IHRL often operates as boosting the effects of IHRL on other branches. Yet, in some other branches, there are well-developed legal mechanisms with a clearly defined adjudicative mandate. The World Trade Organization is one such example. The completeness of the institutional architecture in another branch affects the reception of effects from another branch. In the field of international criminal law, in particular, in the early jurisprudence of the International Criminal Tribunal for the former Yugoslavia, we see a heightened interest receiving the effects of IHRL as custom or treaty law. This interest is partly due to the institutional incompleteness of international criminal law in its early days. The field of international investment law brings yet a different set of institutional challenges. Non-permanent arbitration panels do not create incentives to aim for coherence in the interpretation of international law.

Normatively, branches of international law that are part of this reader have different relationships with IHRL. In international environmental law, international criminal law and international humanitarian law, IHRL operates as co-existing set of norms with norms present in these branches. IHRL complements, demands more, or can be qualified by the norms in these branches. In the fields of international trade and investment law, IHRL enters into interpretive processes as competing non-investment and non-trade public interest concerns (IHRL offering protection to investor rights notwithstanding). The central question in the latter branches is the balancing of interests protected by IHRL and general interests protected by free trade and investor security.

These institutionally and normatively different entry points with respect to the relationship between IHRL and other branches underpin the diversity of effects of IHRL in these branches as well as the extent of effects of IHRL in informing the coherent interpretation of international law that entrenched human rights as one of its fundamental principles.

We hope that the reader acts as a source for international law researchers and practitioners of international law, who are interested in investigating the diverse functions of international human rights law and jurisprudence in other fields of international law and promoting the further entrenchment of human rights in international law.

Case selection methodology

This reader surveys the effects of IHRL across five core branches, international investment law, international criminal law, international humanitarian law, international trade law and international environmental law through selected cases.

The core case selection rationale of the reader is to capture the diversity of the range of effects of IHRL on other branches of international law. IHRL is also not understood in a monolithic fashion. It encompasses human rights as general guiding principles, specific human rights provisions entrenched in international law, and interpretive principles, such as the positive obligations doctrine or the principle of proportionality that are part and parcel of international human rights law interpretation.

The cases selected for the reader comes primarily from international courts and tribunals, while small number of cases from regional integration courts and domestic courts are also included. Surveying the effects of IHRL on other branches of international law through adjudicatory practices faces the challenge of imbalanced existence of international courts and tribunals in other branches of international law. In the fields of international criminal law, international trade law and international investment law, this challenge is not present, as these branches of international law have their own autonomous judicial interpretative institutions. In the case of international trade law, alongside the World Trade Organization Dispute Settlement Organs, we have included cases from the Court of Justice of the European Union to point to the diverse forms the effect human rights law can take in trade disputes.

In the fields of international environmental law and international humanitarian law, there are no international judicial institutions, other than the International Court of Justice, that can entertain the effects of IHRL on another branch. What is more, international human rights courts have, often indirectly adjudicated the effects of IHRL on other branches of international law. In order to overcome this challenge of lack of uneven adjudication in the branches of international law, and best on the most diverse effects criteria, the reader includes cases where international environmental law and international humanitarian law have been indirectly adjudicated by regional human rights courts, where these courts do not only adjudicate IHRL but also develop interpretations of international environmental law and humanitarian law. In these two branches, we also include two cases from domestic courts, those of Israel and the Netherlands, where the

effect of international human rights law on the interpretation of humanitarian law was explicitly addressed.

In each selected case, we first offer a brief statement of facts of the case. This is followed by the decision of the court, where the effect of human rights law on another branch is discussed. We then analyse the type of effect that IHRL had (or did not) in the case. In some of the cases discussed in the reader, the space does not allow for quoting long excerpts from the case. In those cases, we offer direct links to the case for further analysis.

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The Effects of International Human Rights Law on International Investment Law

This section includes cases showing the range of effects of international human rights law (IHRL) on international investment law (IIL). These cases show that IIL makes references to human rights treaties, soft law and the jurisprudence of dedicated human rights bodies. In some cases, while IHRL is considered, there is no effect of IHRL on the outcome of the case. In other cases, however, IHRL has interpretive effects on IIL. The first set of cases below show that IIL has borrowed from IHRL to fill in details in IIL, where it lacks explicit doctrines of its own. In other cases IHRL is invoked to generate a coherent interpretation of international law in the light of human rights obligations by clarifying the scope of the application of IIL and the identification of relevant public interests to be balanced with respect to investor rights.

1. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, Award (8 December 2016)

Facts: The claimants were granted with a concession for water and sewage services in the province of Greater Buenos Aires in early 2000. Claimants alleged that the emergency measures taken by Argentina in the aftermath of the economic crisis in mid-2001, including a conversion of 1:1 between USD and Argentine Peso, made it extremely difficult for the Concession to continue its efficient and profitable operations. The Argentine Republic challenged these arguments by arguing that the failure of the Concession was due to the mismanagement and the companies' incapacity to collect bills in the network of users. Between 2001-2010, significant portion of the population in Buenos Aires lacked running water and access to a sewer network. The investors did not object to these facts, but argued that they doubled the number of served users in the network and performed their contractual obligations. The Argentine Republic raised a counter-claim based on the argument that the investors did not provide the necessary investment in the concession area, and did not comply with their obligations under international law regarding the human right to water. The claimants, on the other hand, stated that guaranteeing human right to water is an obligation of the State, not of the private companies.

Decision: On the question of whether the Tribunal has jurisdiction over the human rights based counter-claim, the Tribunal first notes that the Spain-Argentina BIT is not asymmetrical in nature as granting rights only to the investors. It refers to Article 10 (1) of the BIT, which reads,

Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute.

According to the Tribunal, the provision has a neutral wording, which does not prevent States from suing the investors. It also refers to other paragraphs of the same article to confirm that either of the parties can submit a claim.¹ The Tribunal further notes that the counter-claim has the necessary legal connection with the claimants' arguments.² Regarding the claimants' view suggesting that human rights claim are outside of the jurisdiction, the Tribunal finds that such an argument:

is not sufficient to go so far as excluding on a simple *prima facie* basis any such claim as if it could not imply a dispute relating to an investment.³

Accordingly, human rights claims as long as they relate to an investment may fall into the jurisdiction of the Tribunal. Therefore, the Tribunal concludes that it has jurisdiction over the counter-claim raised by Argentina.⁴

On the merits, the Tribunal first asks the question of whether the Bilateral Investment Treaty (BIT) are deemed as asymmetrical in nature, and whether host state's rights shall be considered in light of the BIT independently from other sources of international law.⁵ The Tribunal at this point again refers to Article 10 (1) of the BIT, and finds that this provision does not exclude the rights of the host state.⁶ The Tribunal adds that investment law cannot be considered as an isolated set of rules which solely aim to protect the rights of the investors.⁷ According to Tribunal,

the definition of disputes capable of being submitted to arbitration and, hence, the possible scope of claims to be submitted to arbitration under Article X is not limited to rights directly based on the application (or interpretation) of the BIT. If Claimants' view of the BIT as a closed system strictly preserving investors' rights under the BIT would be correct, it would not fully reflect the terms of Article X(1), which have a broader scope, as explained above; therefore, Claimants' understanding of the BIT would deprive this provision of part of its meaning.⁸

The Tribunal further refers to Article 12(1) of the Spain-Argentina BIT, which reads as follows:

Where a matter is governed by this Agreement and also by another international agreement to which both Parties are a party *or by general international law*, the Parties and their investors shall be subject to whichever terms are more favorable.⁹

¹ See par. 1143.

² See par. 1151.

³ See par. 1154.

⁴ See par. 1155.

⁵ See par. 1186.

⁶ See par. 1187.

⁷ See par. 1189.

⁸ See par. 1191.

⁹ Emphasis in original. See par. 1192.

Thus, the Tribunal argues that the BIT cannot be kept in isolation without giving consideration to the rules of international law.¹⁰

In discussion of the relationship between the BIT and IHRL, the Tribunal first mentions corporate social responsibility as a standard accepted by international law, which:

includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation."¹¹

It refers to Articles 1, 21(2), 25(1) and 30 of the Universal Declaration of Human Rights and argues that these "may address multinational companies."¹²

The Tribunal further cites Articles 11(1) and 12 of the International Covenant on Economic, Social and Cultural Rights which stipulates the right to water, and Article 5 (1) which reads as follows:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.¹³

The Tribunal refers also to General Comment no. 15 of the UN Committee on Social, Economic and Cultural Rights and UN General Assembly Resolution of July 28, 2010, which recognize the right to water.¹⁴ By referring to these instruments, the Tribunal reaches the following conclusion:

the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.¹⁵

According to the Tribunal, Article 10 (5) of the BIT and Article 42(1) of the ICSID Convention allow the Tribunal to use international law where applicable.¹⁶

¹⁰ See par. 1192.

¹¹ See par. 1195. The Tribunal cites UN Special Representative, John Ruggie's Final Report on ["Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework"](#) (A/HRC/17/31, March 21, 2011) In the footnotes, the Tribunal makes the following explanations on these principles: "According to these principles, business enterprises should respect human rights (No. 11). This responsibility refers to internationally recognized human rights (No. 12). It requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts. (No. 13) In all contexts, business enterprises should: (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate; (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements; (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate. (No. 23)"

¹² See par. 1196.

¹³ See par. 1197.

¹⁴ See par. 1197 citing [General Comment No. 15](#) (2002) on "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights," relating to "The right to water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)", para. 3, submitted to the Economic and Social Council on January 20, 2003 (E.C.12/2002/11, CUL-186, LARA-236)

¹⁵ See par. 1199.

After establishing the relationship between the present case and human right to water, the Tribunal asks the question of:

whether Claimants' as investors were bound by an obligation based on international law to provide the population living on the territory of the Concession with drinking water and sanitation services.¹⁷

It finds that none of the provisions of the BIT impose such an obligation, and that Argentina failed to provide the basis of that obligation in international law.¹⁸ It distinguishes the obligations of the State from the obligations of a company:

The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service. Such obligation would have to be distinct from the State's responsibility to serve its population with drinking water and sewage services.¹⁹

According to the Tribunal, the investors' obligation to perform is derived from domestic law, but not from international law.²⁰ It concludes by stating that

The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case.²¹

The Tribunal concludes that the obligation to ensure the population's right to water was not Argentina's primary focus at the time of the dispute, and that obligation cannot be deemed as belonging to the investor.²² It further stresses that Argentina failed to demonstrate that the alleged violation required a duty of reparation based on international law.²³ Therefore, the Tribunal dismisses Argentina's counterclaim.

Impact of IHRL: The present case stands as a remarkable development regarding the intersection between IHRL and IIL. Firstly, it is the first case where an ICSID Tribunal claims jurisdiction over human rights claims of the host state raised as a counter-claim. Previously such claims raised by the host state in a defense of necessity were rejected in [Suez, Sociedad General de Aguas de Barcelona S.A. and Vivideni S.A. v. Argentina](#). Secondly, the Tribunal refers to corporate social responsibility and human rights obligations of private companies by citing major international human rights instruments like Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, General Comment no. 15 of the UN Committee on Economic, Social and Cultural Rights, and also the UN Guiding Principles on

¹⁶ See par. 1201-1202.

¹⁷ See par. 1206.

¹⁸ See par. 1207-1208.

¹⁹ See par. 1208.

²⁰ See par. 1209- 1210.

²¹ See par. 1210.

²² See par. 1219.

²³ See par. 1220.

Business and Human Rights. It explicitly admits that investment law cannot be applied in isolation from IHRL.

Thirdly, on the question of whether the investors have an obligation to provide the population water services, the Tribunal benefits from IHRL on the distinction between negative and positive obligations under the right to water. This demonstrates that IHRL has an *interpretative effect in clarifying the nature of the obligations of the investors*. While the Tribunal concludes that IHRL does not impose positive obligation (obligation to perform) on the private entities, it admits that the investors may have negative obligation (obligation to abstain) which would have an immediate application. In that sense, the Tribunal does not exclude the possibility of a human rights claim based on negative human rights obligations of the investors to succeed before an investment tribunal- either as a counter-claim or as a defense of necessity.

2. Mondev International Ltd v. United States of America, ICSID Case No ARB(AF)/99/2, Award (11 October 2002)

Facts: Mondev International Ltd and its partner Sefruis Corporation formed the Lafayette Place Associates (LPA) and signed an agreement with the city of Boston and the Boston Redevelopment Authority (BRA) for rehabilitation of a dilapidated area in downtown Boston. Following a dispute between the parties, LPA brought proceedings against the city and BRA. Although the domestic court decided in favor of the LPA, the judgment could not be implemented due to the statutory immunity of the BRA in cases of intentional tort under Massachusetts law. Mondev brought a claim pursuant to the Additional Facility Rules of the International Centre for Settlement of Investment Disputes (ICSID) alleging that statutory immunity breached the minimum standard of treatment clause (Article 1105) of North American Free Trade Agreement (NAFTA). Neither of the parties relied on human rights law.

Decision: The parties sought to draw analogies between their case and the doctrine of foreign State immunity. The ICSID Tribunal agreed on the fact that foreign state agencies can claim immunity before the courts of other states by referring to the European Court of Human Rights (ECtHR) case law:

in a series of decisions the European Court of Human Rights has held that the conferral of immunity in ways recognised in international practice does not involve a denial of access to a court, contrary to Article 6(1) of the European Convention of Human Rights.²⁴

²⁴ [Mondev International Ltd v. United States of America](#) - Award, ICSID, 11 October 2002, par. 141. See the Tribunal citing [Al-Adsani v. United Kingdom](#), ECtHR, App. No. 35763/97, 21 November 2001; [McElhinney v. Ireland](#), European Court of Human Rights, App. No. 31253/96, 21 November 2001; [Fogarty v. United Kingdom](#), European Court of Human Rights, App. No. 37112/97, 21 November 2001.

However, the ICSID Tribunal was not persuaded by the analogy raised by the parties because the doctrine of foreign State immunity is concerned with the position of State agencies before the courts of third parties.²⁵ According to the Tribunal,

there is a closer analogy with certain decisions concerning statutory immunities of State agencies before their own courts.²⁶

Therefore it recalled the judgments of the ECtHR, which questioned the consistency of special governmental immunities with the right of access to a court under Article 6(1) of the ECHR.

The ECtHR decided in Fogarty v. United Kingdom and similar cases that the immunity of the State from civil proceedings would not be consistent with the rule of law.²⁷ However, according to the ECtHR, this:

may not create by way of interpretation of Article 6(1) a substantive civil right which has no legal basis in the State concerned.²⁸

The ICSID Tribunal echoed this reasoning and stated that:

there are difficulties in reading Article 1105(1) so as in effect to create a new substantive civil right to sue BRA for tortious interference with contractual relations.²⁹

According to the Tribunal, although the decisions of the ECtHR on the right to access to a court emanate from a different region and are not concerned with investment protection, they provide “guidance by analogy.”³⁰ In light of these considerations, the Tribunal reached the following decision:

The Tribunal would observe that, as soon as it was decided that BRA was covered by the statutory immunity (a matter for Massachusetts law), then the existence of the immunity was arguably to be classified as a matter of substance rather than procedure in terms of the distinction under Article 6(1) of the European Convention.³¹

Thus, it did not see a breach of the NAFTA.

²⁵ See par. 142.

²⁶ See par. 143.

²⁷ See par. 143. The Tribunal directly quoted Fogarty v. United Kingdom, par. 24-25 (“it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons...”)) and also cited Fayed v. the United Kingdom, European Court of Human Rights, App. No. 17101/90, 21 September 1994, par. 65; Tinnelly & Sons Ltd. v. United Kingdom, European Court of Human Rights, App. No. 20390/92, 10 July 1998; Devlin v. United Kingdom, European Court of Human Rights, App. No. 29545/95, 30 January 2002; Osman v. United Kingdom, European Court of Human Rights, App. No. 23452/94, 28 October 1998; TP & KM v. United Kingdom, European Court of Human Rights, App. No. 28945/95, 10 May 2001.

²⁸ Al-Adsani v. United Kingdom, par. 47; Fogarty v. United Kingdom, par. 25; McElhinney v. Ireland, par. 24.

²⁹ See par. 143.

³⁰ See par. 144.

³¹ See par. 144.

Effect of IHRL: In this case, the interpretation of Article 6(1) on the right to fair trial by the ECtHR provided guidance for the Tribunal. The analogy used by the ICSID Tribunal resulted in a narrow interpretation of the scope of Article 1105 of the NAFTA. The Tribunal explicitly stated that the decisions of the ECtHR in relation to State's immunity before its own courts provided a closer analogy for this investment dispute compared to the doctrine of foreign State immunity. IHRL as interpreted by the ECtHR provided a *detail filling function* allowing the Tribunal to interpret NAFTA in the light of the access to court requirements of the ECtHR.

3. Téicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No ARB(AF)/00/2, Award (29 May 2003)

Facts: Téicas Medioambientales Tecmed was a Spanish company which owned over 99 percent of the shares in a Mexican Company named Tecnicas Medioambientales de Mexico, SA de CV (Tecmed). Tecmed had built a landfill of hazardous industrial waste in the State of Sonora, Mexico and operated it for almost 10 years. In November 1998, Tecmed's application for the renewal of the authorization to operate the landfill was rejected and the State decided on the closure of the landfill. Tecmed alleged that this constituted an expropriation of its investment without compensation. Mexico argued that the decision was made in conformity with its general policy for environmental protection and public health. Neither of the parties directly relied on human rights law.

Decision: The ICSID Tribunal first elaborated the relevance of international law:

The Arbitral Tribunal has to resolve any dispute submitted to it by applying international law provisions (Title VI.1 of the Appendix to the Agreement), for which purpose the Arbitral Tribunal understands that disputes are to be resolved by resorting to the sources described in Article 38 of the Statute of the International Court of Justice considered, also in the case of customary international law, not as frozen in time, but in their evolution.³²

Then, by referring to human rights cases, it decided that indirect de facto expropriation occurs when:

the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed.³³

In order to decide whether de facto expropriation exists, the Tribunal should not:

³² [Téicas Medioambientales Tecmed, SA v. Mexico](#) – Award, 29 May 2003, ICSID Case No ARB(AF)/00/2, par. 116 (original footnotes omitted).

³³ See par. 116 citing [Matos e Silva, Lda., and Others v. Portugal](#), European Court of Human Rights, App. No. 15777/89, 16 September 1996, par. 18.

restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced.³⁴

On the question of whether the State's action is expropriatory, the Tribunal was of the view that State's regulatory administrative actions, even though they are deemed to be beneficial to the society as a whole, are not *per se* excluded from the definition of expropriation.³⁵ Having said this, it decided to look at:

whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.³⁶

It elaborated the principle of proportionality by referring to the ECtHR judgments in Mellacher and others v. Austria and Pressos Compañía Naviera and others v. Belgium:

There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not. On the basis of a number of legal and practical factors, it should be also considered that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitle [sic] to exercise political rights reserved to the nationals of the State, such as voting for the authorities that will issue the decisions that affect such investors.³⁷

The Tribunal further explained proportionality by directly quoting the ECtHR's reasoning in James and others v. United Kingdom:

Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim « in the public interest », but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised...[...]. The requisite balance will not be found if the person concerned has had to bear “an individual and excessive burden” [...] The Court considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto.

....non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-

³⁴ See par. 116 quoting [Baruch Ivcher Bronstein v. Peru](#), Inter-American Court of Human Rights, 16 February 2001, par. 56.

³⁵ See par. 121.

³⁶ See par. 122 citing [Matos e Silva, Lda. and others v. Portugal](#), par. 19.

³⁷ See par. 122 citing [Mellacher and Others v. Austria](#), European Court of Human Rights, App. No. 10522/83, 11011/84, 11070/84, 19 December 1989, par. 24; [Pressos Compañía Naviera and Others v. Belgium](#), European Court of Human Rights, App. No. 17849/91, 20 November 1995, par. 19.

nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.³⁸

After reviewing the facts in light of ECtHR's case law, the Tribunal decided that:

it would be excessively formalistic...to understand that the Resolution is proportional to such violations when such infringements do not pose a present or imminent risk to ecological balance or to people's health.³⁹

Effect of IHRL: The principle of proportionality as consistently applied in the ECtHR jurisprudence was used by the ICSID Tribunal to decide on the necessity of expropriation. IHRL-developed reasoning was employed *to balance the competing interests* of an investor and the State. Regulatory actions of the State aiming to protect environment and public health were not initially excluded from the definition of expropriation. By applying the principle of proportionality, the Tribunal established that the regulatory powers of the State are not per se determinant and the weight of the interests of the investor played a role. From this point of view, this case resulted in a wider protection for the investor from an unlawful expropriation.

A methodological difference between the Tecmed Tribunal and the ECtHR needs to be clarified. The principle of proportionality in the case law of the ECtHR comes to the scene relatively late, after examining the existence of intervention and legitimate aim. If the State party fails to establish its legitimate aim, the ECtHR does not apply the principle of proportionality. The Tecmed Tribunal, however, followed a different order. It examined firstly the effects, and secondly the characteristics of the regulatory action in order to see whether it constituted expropriation. The principle of proportionality was applied in the second phase. The Tribunal, therefore, appropriated the proportionality doctrine for its own purposes.

4. Saipem SpA v. Bangladesh, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007)

Facts: Saipem entered into a contract with Petrobangla, a state-owned entity, to construct a gas pipeline. Saipem completed the construction and Petrobangla took over the pipeline. A dispute arose due to the failure of Petrobangla to pay the additional costs that the parties had agreed upon. Saipem referred this dispute to the International Chamber of Commerce and the Arbitral Tribunal rendered an award in favour of the Saipem. However, upon the request of Petrobangla, the Bangladeshi courts revoked the jurisdiction of the International Chamber of Commerce Tribunal for the dispute and

³⁸ See par. 122 quoting [James and others v. United Kingdom](#), European Court of Human Rights, App. No. 8793/79, 21 February 1986, par. 19-20, 24.

³⁹ See par. 149.

declared the award as illegal and void. Saipem argued before the ICSID that immaterial rights obtained through judicial decisions could be covered under the protection from unlawful expropriation. Neither of the parties raised human rights law.

Decision: The ICSID Tribunal stated that under general international law it is widely accepted that immaterial rights can be subjected to expropriation.⁴⁰ As a further evidence to this argument, it directly quoted ECtHR's jurisprudence showing that the rights under judicial decisions are 'property' that can be object of expropriation.⁴¹ In order to answer the question of whether judicial decisions can be the subject (or the author) of expropriation, the Tribunal again referred to the ECtHR by stating:

the Tribunal notes that the European Court of Human Rights had no hesitation to hold that court decisions can amount to an expropriation.⁴²

Effect of IHRL: The Tribunal borrowed the interpretation on the scope of the right to property made by the ECtHR in order to determine the scope of expropriation both in terms of object and subject. Even though the Tribunal referred to general international law to demonstrate that judicial decisions can be subject and object of expropriation, it particularly referred to the ECtHR jurisprudence to confirm this argument. This judicial borrowing resulted in wider protection for the investor since it extended the scope of protection from expropriation. Thus, IHRL had the effect of *expanding the scope of application* of IIL.

5. Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008)

Facts: The claimants of this case, Mr. Ioan Micula and Mr. Viorel Micula, were born in Romania. They moved to Sweden and obtained Swedish nationality in 1992 and 1995. They held shares in the corporations that stood as complainants in this case. The dispute between the parties arose from the withdrawal of the incentive to encourage investment in the disfavored regions in Romania. Romania alleged that the claimants could not have invoked Swedish nationality before the Tribunal since they did not have an effective link to Sweden. Neither of the parties has invoked human rights law.

⁴⁰ [Saipem SpA v. Bangladesh](#) – Decision on Jurisdiction and Recommendation, 21 March 2007, ICSID Case No. ARB/05/07, par. 130.

⁴¹ See par. 130 quoting [Stran Greek Refineries and Stratis Andreadis v. Greece](#), European Court of Human Rights, App. No. 13427/87, 9 December 1994, par. 59-62; [Brumarescu v. Romania](#), European Court of Human Rights, App. No. 28342/95, 28 October 1999, par. 237-241.

⁴² See par. 132 citing [Allard v. Sweden](#), European Court of Human Rights, App. No. 35179/97, 24 June 2003.

Decision: According to the Tribunal, the interpretation of Article 1 of the Bilateral Investment Treaty (BIT) with respect to nationality required any relevant international law to be taken into account.⁴³ The Tribunal stated that, in its determination of whether the claimant held Swedish nationality:

the Tribunal will be mindful of Article 15 of the Universal Declaration of Human Rights according to which everyone has the right to a nationality, and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.⁴⁴

However it did not refer to this article again in the decision. Rather it focused on under which circumstances the nationality requirements of domestic authorities could be challenged before the Tribunal.

Effect of IHRL: The Tribunal explicitly referred to the Universal Declaration of Human Rights (UDHR) in order *to clarify the scope of application* of IIL. As the Tribunal states, Article 15 of the UDHR offers guidance for the interpretation of the ‘nationality’ requirement set out by the bilateral investment treaties. However it is not clear how this norm affected the reasoning of the Tribunal in the present case.

6. Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award (15 April 2009)

Facts: Phoenix Action was an Israeli corporation and became the sole owner of two Czech companies that were involved in trading of ferroalloys. These two companies were involved in legal disputes with a private entity and the Czech fiscal authorities. The Czech Republic argued that the Tribunal had no jurisdiction *ratione temporis* or *ratione materiae*. Neither of the parties relied on human rights law.

Decision: In its evaluation of whether there is jurisdiction *ratione materiae*, i.e. whether the dispute arose directly out of an investment, the Tribunal emphasized the relevance of public international law and particularly human rights:

It is evident to the Tribunal that the same holds true in international investment law and that the ICSID Convention’s jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of

⁴³ [Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania](#) – Decision on Jurisdiction and Admissibility, 24 September 2008, ICSID Case No. ARB/05/20, par. 87.

⁴⁴ See par. 88.

protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.⁴⁵

At the end, the Tribunal decided that it lacked jurisdiction over the case since there did not exist a protected investment.

Effect of IHRL: According to the Tribunal, investments that are in violation of human rights are excluded from ICSID protection. Thus, compliance with human rights norms like prohibitions on slavery, genocide and trafficking is deemed as a requirement that should be met by investors. IHRL had the effect of *establishing an absolute baseline* for the application of IIL; in particular, the norms that reached a *jus cogens* status. However, it is not clear how this baseline played a role in the final decision of the Tribunal in the present case since the investment in question did not clash with fundamental rules of protection of human rights.

7. Suez, Sociedad General de Aguas de Barcelona S.A. and Vividni S.A. v. Argentina, ICSID Case No ARB/03/19, Decision on Liability (30 July 2010)

Facts: Suez and Vivendi were two French companies that invested in a concession for water distribution and wastewater treatment services in Buenos Aires and surrounding municipalities. The dispute arose due to the alleged failure of Argentina to apply adjustments to the tariff calculation. Five NGOs submitted a joint amicus curiae brief. Argentina raised a defense of necessity by arguing that it adopted measures to secure the right to water of its citizens, and this argument was supported by the amicus curiae's submissions.

Decision: The Tribunal assessed whether the human rights obligations of Argentina trumped its obligations under the BIT. It decided that:

Argentina is subject to both international obligations, *i.e.* human rights *and* treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations. Viewing each treaty as a whole, the Tribunal does not find that any of them excluded the defense of necessity.⁴⁶

Effect of IHRL: Although the Tribunal did not consider the right to water claims, this decision confirmed the interrelatedness of IHRL and IIL. The Tribunal did not grant either branch supremacy

⁴⁵ [Phoenix Action, Ltd. v. The Czech Republic](#) – Award, 15 April 2009, ICSID Case No. ARB/06/5, see par. 78.

⁴⁶ [Suez, Sociedad General de Aguas de Barcelona S.A. and Vividni S.A. v. Argentina](#) – Decision on Liability 30 July 2010, ICSID Case No ARB/03/19. See par. 262 (Emphasis in original).

over the other. IHRL had the effect of *identifying balancing interests in IIL*, even though such balancing was subsequently dismissed.

8. Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award (12 January 2011)

Facts: The Claimants were the Grand River Enterprises Six Nations Ltd. of Ontario, Canada, and three individuals who were members of indigenous peoples of First Nations belonging to the Six Nations. Two of them had shares in Grand River Company, while the other had a tobacco distribution business in the United States. Before the Grand River invested in the United States, it had a Master Settlement Agreement with the major tobacco companies, which regulated taxing, advertising and marketing practice. The claimants argued that they were not included in the negotiations and could not join this agreement although they had an important market share. They referred, among others, to the obligation of the state to consult indigenous peoples on governmental policies or actions significantly affecting them.

Decision: The Tribunal cited Article 19 of the UN Declaration on the Rights of Indigenous Peoples, which imposes an obligation on the States to consult with indigenous peoples through their representative institutions. The Tribunal considered that this norm does not oblige:

consultations with individual investors... who does not purport to have been endowed with authority to represent the First Nations communities of which he is a member in regard to the matters at hand.⁴⁷

The Tribunal seems to be relying on the collective nature of the right to be consulted under Article 19, and abstains from imposing an obligation to consult with the individual investors unless they have the authority to represent the indigenous community.

Effect of IHRL: The Tribunal explicitly referred to a collective human rights norm (i.e., Art. 19, UN Declaration on the Rights of Indigenous Peoples) to overrule indigenous individuals' rights claims. The Tribunal rejected the investor's allegation by emphasizing the collective nature of the indigenous right to be consulted under Article 19 of the UN Declaration. IHRL had the effect of *specifying the standing of investors* in IIL.

⁴⁷ [Grand River Enterprises Six Nations, Ltd., et al. v. United States of America](#) – Award, UNCITRAL, 12 January 2011, par. 211.

9. Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award (7 December 2011)

Facts: Spyridon Roussalis was a Greek citizen who purchased 70% of shares in a privatized company in Romania. The shareholders of this company had a post-purchase investment through a share capital increase. The claimant argued that Romania attempted to reclaim the privatized company's shares via lengthy and unjustified court proceedings. Besides the breaches of the BIT, Roussalis argued that Romania violated Article 6 of the ECHR and Article 1 of the First Additional Protocol.

Decision: The Tribunal stated that it did not exclude the possibility that international obligations of the States include the ECtHR. However, it decided not to rule on human rights claims, finding that,

given the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments.⁴⁸

Effect of IHRL: The Tribunal observed that the State might have international human rights obligations applying alongside the protection provided by the BIT. Nonetheless, IHRL had no particular effects in the present case. Indeed, the Tribunal preferred relying solely on the investment law instrument, which, in its opinion, provided higher and more specific protection to the investor compared to the ECHR. This can also be read as avoidance by the Tribunal to deal with a potential conflict between IHRL and IIL.

10. Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL, Final Award (15 December 2014)

Facts: Mr. Al-Warraq had shares in various banks in Indonesia. Following the bailout of one of these banks, he was arrested and charged with embezzlement and mismanagement. He alleged that Indonesia violated his right to fair trial. He asked the Tribunal to apply the principle of systemic integration and interpret the term 'basic rights' in Article 10(1) of the Organization of the Islamic Conference (OIC) Investment Agreement as including the right to fair trial. He referred, among others, the ECHR, International Covenant for the Protection of Civil and Political Rights (ICCPR), African Charter on Human and People's Rights and the jurisprudence of the Inter-American Court of Human Rights.⁴⁹

⁴⁸ See par. 312.

⁴⁹ [Hesham Talaat M. Al-Warraq v. Republic of Indonesia](#) – Final Award, UNCITRAL, 15 December 2014, see par. 178-183 for the Claimant's arguments.

Decision: The Tribunal rejected Al-Warraq's argument suggesting that the term 'basic rights' includes human rights in general. In that vein, the Tribunal held that 'basic rights' as contained in OIC Agreement:

refers to 'basic property rights' and is not a general reference to civil and political rights such as the right to a fair trial pursuant to Article 14 of the ICCPR relied upon by the Claimant.⁵⁰

Effect of IHRL: Although the claimant referred to various human rights instruments in this case, IHRL had no impact in the decision of the Tribunal. The Tribunal relied on a strict interpretation of the OIC Agreement.

⁵⁰ See par. 521.

The Effects of International Human Rights Law on International Humanitarian Law

International Humanitarian Law (IHL) is one of the branches of international law that lacks its own court. Thus, most violations of IHL are adjudicated before human rights bodies and increasingly domestic courts. Indeed, an important aspect of International Human Rights Law (IHRL) is that it provides a forum for the adjudication of IHL; human rights courts fill an enforcement gap in IHL. As our list shows, the Inter-American Court of Human Rights has adjudicated these cases referring directly to IHL. Most of these cases, first, focus on the co-existence of IHRL and IHL in times of conflict, and, then, delve into how IHL might affect IHRL or vice versa. This acknowledgment that IHRL and IHL are both applicable in times of armed conflict has been treated in a slightly different way by human rights bodies, the International Court of Justice and domestic courts. We thus decided to include in our list cases from this three types of jurisdiction. Some of our cases also show that the effect of IHRL on IHL can have a concrete dimensions. This manifests itself as the identification of concrete positive obligations in IHL or even filling in the details in IHL where the law is silent. The last case in the section shows that when a State does not invoke IHL before a human rights court, the Court adjudicates the case under a strict IHRL framework, while in the background IHL was applicable to the facts. It thus demonstrates that IHRL proceedings may affect the assessment of the conduct of States in armed conflicts.

1. Mapiripan Massacre v. Colombia, Judgment, Inter-American Court of Human Rights (15 September 2005)

Facts: This case is about the massacre of at least forty-nine individuals in Mapiripán, Colombia, by members of the Autodefensas Unidas de Colombia (AUC), a paramilitary group, aided and abetted by the Colombian military. Colombia acknowledged its responsibility for the acts committed by its officials but not by members of the paramilitary groups. All parties to the proceedings agreed that there was an armed conflict in Colombia at the time of the impugned acts but none explicitly invoked rules of IHL in their pleadings. The Court raised the relevance of this body of law on its own motion.

Decision: The Court found that the State had violated inter alia Articles 4 (Right to Life), 5 (Right to Humane Treatment), and 7 (Right to Personal Liberty), Article 8 (Right to a fair trial), Article 19 (Rights of the child), Article 22 (Freedom of movement and residence), and Article 25 (Right to judicial protection) of the Inter-American Convention on Human Rights. Before determining the provisions Colombia had breached the Court affirmed:

with regard to establishment of the international responsibility of the State in the instant case, the Court cannot set aside the existence of general and special duties of the State to protect the civilian population, derived from International Humanitarian Law, specifically Article 3 common of the August 12, 1949 Geneva Agreements and the provisions of the additional Protocol to the Geneva Agreements regarding protection of the victims of non-international armed conflicts (Protocol II). Due respect for the individuals protected entails passive obligations (not to kill, not to violate physical safety, etc.), while the protection due entails positive obligations to impede violations against said persons by third parties. Carrying out said obligations is significant in the instant case, insofar as the massacre was committed in a situation in which civilians were unprotected in a non-international domestic armed conflict.⁵¹

The Court continued:

The obligations derived from said international provisions must be taken into account, according to Article 29.b) of the Convention, because those who are protected by said treaty do not, for that reason, lose the rights they have pursuant to the legislation of the State under whose jurisdiction they are; instead, those rights complement each other or become integrated to specify their scope or their content. While it is clear that this Court cannot attribute international responsibility under International Humanitarian Law, as such, said provisions are useful to interpret the Convention, in the process of establishing the responsibility of the State and other aspects of the violations alleged in the instant case.⁵²

While considering whether Article 19 (Rights of the Child) had been breached during the enforced displacement, the Court affirmed:

The content and scope of Article 19 of the American Convention must be specified, in cases such as the instant one, taking into account the pertinent provisions of the Convention on the Rights of the Child, especially its Articles 6, 37, 38 and 39, and of Protocol II to the Geneva Conventions, as these instruments and the American

⁵¹ [Mapiripán Massacre v. Colombia](#), Judgment, 15 September 2005, par. 114. The Court referred in this regard to the Judgment of the Constitutional Court of Colombia, Judgment C-225/95 of May 18, 1995, par. 35 and 30: “Article 4 of [Protocol II] not only orders general protection of non-combatants but also, developing Article 3 common of the 1949 Geneva Conventions, embodies a series of absolute prohibitions, which may be considered the essential nucleus of the guarantees provided by international humanitarian law. [...] [the principle of] differentiating between the combatant and non-combatant population has basic consequences. Thus, first of all, as the immunity rule of Article 13 [of Protocol II] sets forth, the parties have the general obligation to protect the civilian population against the dangers caused by military operations. Therefore, as paragraph 2 of this article states, this population, as such, cannot suffer military attack, and acts or threats of violence whose main aim is to terrorize it are forbidden. Also, this general protection of the civilian population against the dangers of war also means that it is not in accordance with international humanitarian law for one of the parties to involve this population in the armed conflict, since in this way it becomes an actor in that conflict, which would expose it to military attacks by the other party. [...] Whatever the legal status of normalcy or of a politically abnormal situation, civil society that is a victim of armed confrontation must be protected by the State.”

⁵² See par. 115. Within this passage the Court referred to [Case of the Serrano Cruz Sisters](#), Preliminary Objections, Judgment of November 23, 2004. Series C No. 11, par. 108, 119; [Case of Las Palmeras](#), Preliminary Objections, Judgment of February 4, 2000. Series C No. 67, par. 32-34; [Case of Bámaca Velásquez](#), Judgment of November 25, 2000. Series C No. 70, par. 208 - 209.

Convention are part of a very comprehensive international *corpus juris* for protection of children, which the States must respect.⁵³

While appraising the scope and content of Article 22 (Freedom of movement and residence), the Court considered:

the regulations on displacement included in Protocol II to the 1949 Geneva Conventions are also especially useful to apply the American Convention to the situation of domestic armed conflict in Colombia. Specifically, Article 17 of Protocol II prohibits ordering the displacement of civilian population for reasons related to the conflict, unless this is required by the safety of civilians or for imperative military reasons, and in the latter case ‘all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.’⁵⁴

As part of the measures the Court ordered to satisfy the victims:

Bearing in mind that the Mapiripán Massacre was committed by paramilitary who acted with the collaboration, tolerance and acquiescence of State agents, breaching the imperative provisions of International Law, the State must take steps to train the members of its armed forces and of its security agencies regarding the principles and provisions for protection of human rights and of international humanitarian law and on the limits to which it must be subject. Therefore, the State must implement, within a reasonable time, permanent education programs on human rights and international humanitarian law within the Colombian Armed Forces, at all hierarchical levels.⁵⁵

Effect of IHRL: First, the Court defined the relationship between IHL and IHRL as both bodies of law either “complement each other or become integrated to specify their scope or their

⁵³ See par. 153. The court also referred its own judgments where it interpreted Article 19 in accordance with the convention on the rights of the Child. More importantly for the purpose of this study, it referred to the judgment of the Constitutional Court of Colombia where it was affirmed: “Number 3 Article 4 of [Protocol II] grants privileged treatment to children, with the aim of providing them with the care and support they need, especially with regard to education and family unity. It also points out that minors under 15 will not be recruited by armed forces or groups and will not be allowed to participate in the hostilities. The Court deems that said special protection to children is fully in harmony with the Constitution, because not only are they in a clearly weak situation (PC Art. 13) in armed conflicts but the constitution also assigns the highest priority to the rights of children (PC Art. 44) [...]” Constitutional Court of Colombia, Judgment C-225/95 of May 18, 1995.

⁵⁴ See par. 172. It also noted a judgment of the Constitutional Court of Colombia where it was deemed that “in the Colombian case, application of these rules by the parties in conflict is also especially imperative and important, because the country’s armed conflict has severely affected the civilian population, as shown by the alarming data on forced displacement of persons.” Constitutional Court of Colombia, Judgment C-225/95 of May 18, 1995, par. 33.

⁵⁵ See par. 316. Moreover in par. 317 the Court referred to the Judgment of the Constitutional Court of Colombia where it was pointed out, with regard to the obligations derived from Protocol II to disseminate international humanitarian law, that knowledge of said law “is an essential requirement for it to be respected by the parties that oppose each other. Therefore [...] all humanitarian law agreements attach a special importance to the task of disseminating humanitarian rules, not only among the opposing parties but also among the civilian population, for the latter to be aware of its rights in the context of the armed conflict. Furthermore, [...] the State must disseminate them [and] and they must be studied in educational institutions [...] Specifically, [it is] indispensable for the members of the security forces to be familiar with humanitarian rules, not only because they are natural addressees of said regulations but also because the Constitution itself states that they must receive human rights education [...]” Constitutional Court of Colombia, Judgment C-225/95 of May 18, 1995.

content.” Second, the Court interpreted the obligation arising from IHL with an IHRL lens; *qualifying the former under the prisms of negative and positive obligations*. By adopting a convergence approach, IHRL brings *substantive positive obligations* to IHL and vice versa. To be noted that IHL already contains positive obligations, via the duty to ensure respect under common Article 1 of the Geneva Conventions, but these obligations are generally interpreted with a more limited scope than under IHRL.⁵⁶ Third, in the same vein as the previous point, the Court ordered as reparation under IHRL that the State disseminates IHL. Hence, the Court transformed this IHL duty as form of reparation.

2. Coard et al v. United States, Decision, Inter-American Commission on Human Rights (29 September 1999)

Facts: The complainants claimed that the US military action in Grenada in October of 1983 violated their rights under the American Declaration of the Rights and Duties of Man; specifically: Article I, the right to life, liberty and personal security; Article II, the right to equality before the law; Article XXV, the right to protection from arbitrary arrest; Article XVII, the right to recognition of juridical personality and civil rights; Article XVIII, the right to a fair trial; and Article XXVI, the right to due process of law. The parties did not dispute that the situation originated in the context of an international armed conflict as defined in common Article 2 of the Geneva Conventions. The United States argued that the situation denounced was governed wholly by IHL, a body of law over which the Commission lacks the jurisdiction or specialized expertise to apply.

Decision: Responding to the United States’ argument, the Commission observed:

while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity," and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict, and this is reflected, inter alia, in the designation of certain protections pertaining to the person as peremptory norms (*jus cogens*) and obligations *erga omnes*, in a vast body of treaty law, in principles of customary international law, and in the doctrine and practice of

⁵⁶ See Happold, M. (2009) ‘The Conference of High Contracting Parties to the Fourth Geneva Convention1’, Yearbook of International Humanitarian Law, 4, pp. 399–402.

international human rights bodies such as this Commission. Both normative systems may be thus be applicable to the situation under study.⁵⁷

It added:

the State's assertion that the application of humanitarian law would wholly displace the application of the Declaration is also inconsistent with the doctrine and practice of the system. The Commission has encountered situations requiring reference to Article XXVIII of the Declaration, which specifies that "[t]he rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy" since the inception of its case system. The Declaration was not designed to apply in absolute terms or in a vacuum, and the Commission has necessarily monitored the observance of its terms with reference to its doctrine on permissible and non-permissible limitations, and to other relevant obligations which bear on that question, including humanitarian law.⁵⁸

The Commission noted that:

in a situation of armed conflict, the test for assessing the observance of a particular right, such as the right to liberty, may, under given circumstances, be distinct from that applicable in a time of peace. For that reason, the standard to be applied must be deduced

⁵⁷ [Coard et al v. United States](#), Inter-American Commission on Human Rights, Decision, Case 10.951, 29 September 1999, par. 39. The quotation within our quotation referred to the following cases and instruments: IACHR, IACtHR, [Abella v. Argentina](#), Case 11.137, Report No. 55/97, 18 November 1997. See also, A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. I, 1st ed. (Sérgio A. Fabris ed. 1997) at 269-80 (examining the normative, interpretive and operative relationship between human rights, humanitarian, refugee law). The American Declaration had its genesis in the recognition that the atrocities of World War II had demonstrated the linkage between respect for human rights and peace, the threat to fundamental rights in times of war, and the need to develop protections independent of the reciprocal undertakings of States. See, Act of the Inter-American Conference on Problems of War and Peace (the resolution which led to the adoption of the Declaration). With reference to the core guarantee applying all times the Commission referred to See, e.g., United Nations Resolution 2675 (XXV)(1970)(reflecting recognition that fundamental rights "apply fully in situations of armed conflict"); Security Council Resolution 237 (1967)(indicating that essential and inalienable rights must be respected even in times of war) and General Assembly Resolution 2252 (ES-V)(1967); [Cyprus v. Turkey](#), European Court of Human Rights, App. No. 25781/94, 10 Mai 2001, at paras. 509-10 (citing applicability of European human rights regime to conflict situations, citing Resolution 2675). With respect to the Commission body of decision that referred to the erga omnes and jus cogens nature of some protections, it referred to e.g., Report of the IACHR on its Activities in the Dominican Republic, OEA/Ser.L/V/II.15, doc. 6, 1966; Report on the Situation of Human Rights in El Salvador and Honduras, OEA/Ser.L/V/II.23, doc. 9, rev. 1, 1970; Report on the Situation of Human Rights in Uruguay, OEA/Ser.L/V/II.43, doc. 10 corr. 1, 1978; Report on the Situation of Human Rights in Nicaragua, OEA/Ser.L/V/II.45, doc. 16 rev. 1, 1978; Report on the Situation of Human Rights in Argentina, OEA/Ser.L/V/II.49, doc. 19, 1980.

⁵⁸ See par. 41, to sustain its argument, the Commission referred to "[A] rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part." ICJ, *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, 1980 I.C.J. 73, 76; See e.g., IACHR, Report on the Situation of Human Rights in Uruguay, OEA/Ser.L/V/II.43, doc. 10 corr. 1, 1978, at 8; (referring to Geneva Conventions of 1949); Report on the Situation of Human Rights in Nicaragua, OEA/Ser.L/V/II.45, doc. 16 rev. 1, 1978, at 33, 77 (applying Geneva Conventions to conflict-related casualties, reporting on obstruction of ICRC work); Report on the Situation of Human Rights in Argentina, OEA/Ser.L/V/II.49, doc. 19, 1980 (referring to Standard Minimum Rules for the Protection of Prisoners, humanitarian law).

by reference to the applicable *lex specialis*. The American Declaration is drawn in general terms, and does not include specific provisions relating to its applicability in conflict situations. As will be seen in the analysis which follows, the Commission determined that the analysis of the petitioners' claims under the Declaration within their factual and legal context requires reference to international humanitarian law, which is a source of authoritative guidance and provides the specific normative standards which apply to conflict situations. In the present case, the standards of humanitarian law help to define whether the detention of the petitioners was "arbitrary" or not under the terms of Articles I and XXV of the American Declaration.⁵⁹

However, it also stressed that:

while the Commission may find it necessary to look to the applicable rules of International Humanitarian Law when interpreting and applying the norms of the inter-American human rights system, where those bodies of law provide levels of protection which are distinct, the Commission is bound by its Charter-based mandate to give effect to the normative standard which best safeguards the rights of the individual.⁶⁰

Taking into account all the above considerations, the Commission found that the detention for 6-9 days after the cessation of hostilities without access to any review of the legality violated Articles I, XVII and XXV of the American Declaration of the Rights and Duties of Man. In particular, it held:

Under normal circumstances, review of the legality of detention must be carried out without delay, which generally means as soon as practicable. Article 78 of the Fourth Geneva Convention indicates that review is to be carried out "with the least possible delay." While the United States has referred to various phases of its military operations in Grenada, including a "hostilities phase" from October 25 to November 2, 1983, its own records indicate that fighting ceased on or about October 27, 1983. The petitioners were held in United States custody for a total of nine to twelve days prior to being transferred to Grenadian and CPF custody, which means they were held for six to nine days after the cessation of hostilities without access to any review of the legality of their detention. This delay, which is not attributable to a situation of active hostilities or explained by other information on the record, was incompatible with the terms of the American Declaration of the Rights and Duties of Man as understood with reference to Article 78 of the Fourth Geneva Convention.⁶¹

⁵⁹ See par. 42. With respect to *lex specialis*, the Commission referred to ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, par. 25.

⁶⁰ See par. 42.

⁶¹ See par. 57 and 55-60; with respect to the delay applicable under normal circumstances the Commission referred to the following: No violation arises "if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible." [Brogan and the others v. The United Kingdom](#), European Court of Human Rights, App. Nos. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988. See also [De Jong, Baljet and van den Brink v. Netherlands](#), European Court of Human Rights, App. Nos. 8805/79, 8806/79, 9242/81, 22 May 1984. Under normal circumstances, the UN Human Rights Committee has found detention for 48 hours without judicial review to be questionable. See UN, Human Rights and Pre-trial Detention (1994), at 12, citing UNGAOR, 45th

Effect of IHRL: The Commission called for co-application of both regimes and not necessarily an effective displacement of IHRL by IHL. However, it also specified that it would give effects to the normative framework that best safeguards the rights of the individual. Thus, if in a specific case it would have found that applying IHL was in the best interest of the individual, it could have opted for strictly assessing the facts under this framework and not under IHRL.

3. Hassan v. the United Kingdom, European Court of Human Rights, App. No. 29750/09 (16 September 2014)

Facts: Tarek Hassan, an Iraqi national was arrested and detained by UK forces in Iraq on the grounds that he was a suspected combatant or a civilian posing a threat to security. Following his release his body was found dead with marks of torture. The complaint under consideration by the European Court of Human Rights (ECtHR) was whether the British authorities had failed to carry out an effective investigation into the circumstances of Hassan's detention, ill-treatment, and death, and whether his arrest and detention were arbitrary and unlawful, and lacking in procedural safeguards. To be noted that this is the first case where a State invoked IHL before the ECtHR; in particular, the British authorities requested the Court to disapply its obligations under Article 5 (right to liberty) or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law. However, UK had not issued a declaration of derogation under Article 15 of the European Convention on Human Rights (ECHR).

Decision: With respect to the capture and detention of Hassan, the Court held that IHL and IHRL applied concurrently. Article 5 (1) ECHR sets out the general rule that "[e]veryone has the right to liberty and security of the person" and that "[n]o one shall be deprived of his liberty" except in one of the circumstances set out in sub-paragraphs (a) to (f). The Court affirmed that it:

does not take the view that detention under the powers provided for in the Third and Fourth Geneva Conventions is congruent with any of the categories set out in subparagraphs (a) to (f).⁶²

It then asserted that in light of Articles 31 (3) (b), subsequent agreements, and 31 (3) (c), harmonious interpretation with other rules of international law, of the Vienna Convention on the Law of Treaties:

Sess., Supp. 40 (A/45/40), vol. I, par. 333 (report of Federal Republic of Germany). Delays of four and five days in the presentation of a detainee before a judicial authority have been held violative. See [Brogan and the others v. The United Kingdom](#), supra; [Koster v. The Netherlands](#), European Court of Human Rights, App. No. 12843/87, 28 November 1991.

⁶² [Hassan v. the United Kingdom](#), European Court of Human Rights, App. No. 29750/09, 16 September 2014, par. 97.

the Court accepts the Government's argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case.⁶³

The Court then considered that:

even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.⁶⁴

As regards procedural safeguards, the Court considered that,

in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of IHL. Articles 43 and 78 of the Fourth Geneva Convention provide that internment "shall be subject to periodical review, if possible every six months, by a competent body".⁶⁵

It further found that in international armed conflict an internment review could be conducted by a 'competent body', as required by the Articles 43 and 78 of the Fourth Geneva Convention, as opposed to a court, as required by Article 5 (4) ECHR:

Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court" in the sense generally required by Article 5 § 4, nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the "competent body" should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay.⁶⁶

The Court found that the capture and detention of Hassan was in conformity with the ECHR as:

⁶³ See par. 103.

⁶⁴ See par. 104. It also referred to the International Court of Justice judgment in *Armed Activities on the Territory of the Congo*, and to the advisory opinion concerning *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

⁶⁵ See par. 106.

⁶⁶ See par. 106. The Court referred to [Reinprecht v. Austria](#), European Court of Human Rights, App. No. 67175/01, 15 November 2005, par. 31.

the United Kingdom authorities had reason to believe that he might be either a person who could be detained as a prisoner of war or whose internment was necessary for imperative reasons of security, both of which provided a legitimate ground for capture and detention (see Articles 4A and 21 of the Third Geneva Convention and Articles 42 and 78 of the Fourth Geneva Convention [...]).⁶⁷

Moreover,

in the light of his clearance for release and physical release within a few days of being brought to the Camp, it is unnecessary for the Court to examine whether the screening process constituted an adequate safeguard to protect against arbitrary detention. Finally, it would appear from the context and the questions that Tarek Hassan was asked during the two screening interviews that the reason for his detention would have been apparent to him.⁶⁸

Effect of IHRL: IHRL influenced the overall legal framework applicable to internment reviews. In this case it provided detailed regulations in relation to how a competent body as provided in IHL may also be in accordance with IHL, that is, by respecting the rules of impartiality, fair procedure and so on. Thus, IHRL can have *the effect of filling in procedural details* IHL.

4. Public Committee against Torture in Israel and others v. Government of Israel and others, (the targeted killings case) the Supreme Court of Israel (14 December 2006)

Facts: Two human rights organizations challenged the policy of preventive strikes employed by Israel in the Gaza strip and the West Bank. The policy of preventive strikes aimed to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israeli civilians and soldiers. The petitioners claimed that this policy violated the human rights recognized in Israeli and international law, both the rights of those targeted, and the rights of innocent passersby caught in the targeted killing zone. The respondent argued that in light of the armed conflict ‘between Israel and the terrorist organizations’, the law applicable to these preventive strikes is IHL.

Decision: The Supreme Court of Israel considered that the conflict between Israel and the various ‘terrorist’ organizations active in the occupied territories constituted an international armed conflict.⁶⁹ It found that:

⁶⁷ See par. 109.

⁶⁸ See par. 110.

⁶⁹ [Public Committee against Torture in Israel and others v. Government of Israel and others](#), (the targeted killings case) the Supreme Court of Israel, HCJ 769/02, 14 December 2006, par. 16 et ss.

humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (lacuna) in that law, it can be supplemented by human rights law.⁷⁰

When addressing the IHL rules on the targeting of civilians taking direct part in hostilities, the Court referred to ECtHR judgment in Ergi v. Turkey and stated that:

Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities.⁷¹

It further affirmed:

a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.⁷²

This position was also supplemented with a reference to the ECtHR, where in McCann v. United Kingdom, it was held:

the use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk.⁷³

The Court also referred to McCann v. United Kingdom to affirm that:

after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent.⁷⁴

The view that IHRL can be applied “where there is a lacuna in the laws of armed conflict” was reiterated in A & B v. The State of Israel, Supreme Court of Israel sitting as the Court of Criminal Appeals (2008), where the Court applied a mixture of IHRL and IHL in a situation of occupation.

Effect of IHRL: The Court allowed IHRL to be applied to *fill gaps in* IHL. If there is a lacuna in IHL, the Court held that it would resort to IHRL to find the applicable law.

⁷⁰ See par. 18, it referred to the following sources: the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226, 240; Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136; Bankovic v. Belgium, European Court of Human Rights, App. No. 52207/99, 12 December 2001; Meron, The Humanization of Humanitarian Law, 94 American Journal of International Law 239 (2000).

⁷¹ See par. 40.

⁷² See par. 40.

⁷³ See par. 40. McCann v. United Kingdom, European Court of Human Rights, App. No. 18984/91, 27 September 1995, par. 235.

⁷⁴ See par. 40. ECtHR, McCann v. United Kingdom, at pp. 161, 163; as well as McKerr v. United Kingdom, European Court of Human Rights App. No. 28883/95, 4 May 2001.

5. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, International Court of Justice (9 July 2014)

Facts: The International Court of Justice (ICJ) was asked by the UN General Assembly to issue an advisory opinion on the legality of the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory. Israel disagreed that IHRL applied to the case. It asserted that IHL is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace. Other participants in the proceedings contended that, on the contrary, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are both applicable within the Occupied Palestinian Territory.

Decision: The ICJ found that IHRL continues to apply in armed conflicts stating that:

the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.⁷⁵

This highlights that certain provisions are not derogable even in times of emergency or armed conflict. Also, human rights treaties that have no derogation clause apply in their totality.

On the relationship between both regimes, the Court said:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.⁷⁶

This passage reflects in some way the dictum of the Court in the Nuclear Weapons Advisory Opinion where the ICJ stated:

[i]n principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life,

⁷⁵ [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, International Court of Justice, 9 July 2014, par. 106.

⁷⁶ See par. 106.

through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁷⁷

Hence, there are situation where IHRL may be the only applicable law, even in times of armed conflicts.

However, it is not the whole law of armed conflict that is the *lex specialis* but the particular norm regulating the specific situation. When the ICJ in Democratic Republic of the Congo v Uganda (armed activities case) quoted its dictum from the Wall and Nuclear Weapons Cases, it dropped the reference to *lex specialis*; thus, leading to a convergence approach.⁷⁸

Effect of IHRL: Since the ICJ is the highest court in the world, the Wall, Nuclear Weapons and Armed activities cases bear significant importance in particular for the authority that issued them. These *obiter dicta* set that IHRL may be applicable in situations of armed conflict, when IHL is not regulating the specific issue. If IHL regulates the specific issue, *IHRL may complement IHL*. It is to be noted that as the relationship of IHRL with other branches continues to develop, thus these pioneering cases from the ICJ are subject to an evolving interpretation over time.

6. Santo Domingo Massacre v. Colombia, Inter-American Court of Human Rights, Judgment (30 November 2012)

Facts: This case deals with the use of cluster munitions by the Colombian air force against the village of Santo Domingo, in 1998. The Commission asked the Court to declare that Colombia violated the right to life and to personal integrity contained in Articles 4(1) and 5(1), the right to property established in Article 21(1) and 21(2), the right to freedom of movement and residence established in Article 22(1), and the rights to judicial guarantees and judicial protection, established in Articles 8(1) and 25 of the American Convention on Human Rights. The State objected that the Court did not have jurisdiction over the alleged violations of the rights to life, personal integrity, property, and freedom of movement and residence, because these were matters relating to the presumed violation of norms of IHL. The representatives of the victims argued:

that studying, analyzing and interpreting the normative framework of international humanitarian law as a complement to international human rights law is an effective

⁷⁷ Note that this passage was also referred to in the Wall Case; [Legality of the Threat or Use of Nuclear Weapons](#), Advisory Opinion, I. C.J. Reports 1996, p. 226, par. 25.

⁷⁸ [Case Concerning Armed Activities on the Territory of the Congo \(Democratic Republic of the Congo v. Uganda\)](#), Judgment, International Court of Justice, 19 December 2005, par. 216.

formula to decide this case, which undoubtedly represents and develops aspects that need to be dealt with as part of inter-American public order.⁷⁹

Decision: The Inter-American Court of Human Rights first stated that:

the American Convention is an international treaty under which the States Parties undertake to respect the rights and freedoms recognized therein and to ensure the exercise of such rights and freedoms to all persons subject to their jurisdiction, and that the Court is competent to decide whether any State act or omission, in times of peace or armed conflict is compatible with the American Convention. In addition, the Court indicated that, in this activity, the Court has no normative limit and that any legal norm may be submitted to this examination of compatibility.⁸⁰

It regarded its application of IHL as follows:

by using IHL as a supplementary norm of interpretation to the treaty-based provisions, the Court is not making a ranking between normative systems, because the applicability and relevance of IHL in situations of armed conflict is evident. This only means that the Court can observe the regulations of IHL, as the specific law in this area, in order to make a more specific application of the provisions of the Convention when defining the scope of the State's obligations.⁸¹

Before examining the responsibility of Colombia for the alleged violations of the rights to life, personal integrity and measures of protection for children in relation to the obligations of respect and guarantee, it affirmed that:

since the events occurred in the context of a non-international armed conflict [...] the Court considers it useful and appropriate to interpret the scope of the treaty-based norms

⁷⁹ [Santo Domingo Massacre v. Colombia](#), Inter-American Court of Human Rights, Judgment, 30 November 2012, par. 20.

⁸⁰ See par. 21; the Court referred to, among others: [Case of the Plan de Sánchez Massacre v. Guatemala](#), Merits, Inter-American Court of Human Rights, April 29 April 2004; [Case of the Las Dos Erres Massacre v. Guatemala](#), Preliminary objections, merits, reparations and costs, Inter-American Court of Human Rights, 24 November 2009; [Case of Las Palmeras v. Colombia](#), Preliminary objections, Inter-American Court of Human Rights, 4 February 2000; [Case of the Pueblo Bello Massacre v. Colombia](#), Judgment, Inter-American Court of Human Rights, 31 January 2006; [Case of the Ituango Massacres v. Colombia](#), Judgment, Inter-American Court of Human Rights, 1 July 2006; [Case of the La Rochela Massacre v. Colombia](#), Merits, reparations and costs, Judgment, Inter-American Court of Human Rights, 11 May 2007; [Case of Contreras et al. v. El Salvador](#), Merits, reparations and costs, Judgment, Inter-American Court of Human Rights, 31 August 2011; [Case of the Río Negro Massacres v. Guatemala](#), Preliminary objections, merits, reparations and costs, Judgment, Inter-American Court of Human Rights, 4 September 2012; [Case of the Massacres of El Mozote and nearby places v. El Salvador](#), Merits, reparations and costs, Judgment, Inter-American Court of Human Rights, 25 October 2012 and [Case of the "Mapiripán Massacre" v. Colombia](#), Merits, reparations and costs, Judgment, Inter-American Court of Human Rights, 15 September 2005.

⁸¹ See par. 24.

and obligations in a way that complements the norms of international humanitarian law, based on their specificity in this matter [...].⁸²

The Court found that a machine gun attack by the Colombian Air Forces and their failure to comply with IHL rules (the principle of precaution in attack) endangered the civilian population and thus amounted to a breach of the rights to life and personal integrity (Articles 4–5 ACHR), even if nobody had been killed or injured:

this action by members of the Colombian Air Force entailed a failure to comply with the obligation to guarantee the rights to life and personal integrity in the terms of the American Convention of the inhabitants of Santo Domingo, who were affected by the endangerment of their rights by the mere fact of having been the object of these indiscriminate attacks, irrespective of whether anyone was killed or injured.⁸³

Effect of IHRL: Using this IHRL monitoring body provided a forum for acknowledging that violations of IHL occurred and that these violations also constituted violations of IHRL even if no injury or death occurred. Thus, IHRL is supplementing IHL by *offering redress for IHL violations via the right to a remedy*. On the other hand, this case is also exemplifying the interpretative effect of IHL on IHRL.

7. Juan Carlos Abella v. Argentina (La Tablada), Inter-American Commission of Human Rights (18 November 1997)

Facts: This case concerns an attack launched by 42 armed persons on military barracks of the national armed forces in 1989 at La Tablada, Argentina. The attack precipitated a battle between the attackers and the Argentinian armed forces, which lasted approximately 30 hours and resulted in the deaths of 29 of the attackers and several State agents. The surviving attackers filed a complaint with the Commission alleging violations by State agents of Articles 4 (right to life), 5(1) (right to humane treatment), 7(5) (right to be tried within a reasonable time), 8 (judicial guarantees), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention on Human Rights. They also referred to rules of IHL in support of their allegations that State agents used excessive force and illegal means in their efforts to recapture the La Tablada military base. The State's communication referred to IHL and noted that such rules apply

⁸² See par. 187. It referred to [Case of the Ituango Massacres v. Colombia](#), par. 179; [Case of the Mapiripán Massacre v. Colombia](#), paras. 114, 153 and 172, and [Case of the Massacres of El Mozote and nearby places v. El Salvador](#), par. 141.

⁸³ See par. 231-237, but also note that “However, the representatives and the Commission did not individualize those who were the victims of these grave events, so that it is not incumbent on the Court to make a separate ruling in this regard.”

only to international armed conflicts, which was not the case of the events of January 1989 at La Tablada.

Decision: The Commission determined that, as a result of careful planning and coordination, the military operation was a real internal armed conflict, which triggered Common Article 3:

despite its brief duration, the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities.⁸⁴

On the proximity between IHRL and IHL, it affirmed:

the provisions of common Article 3 are essentially human rights law. Thus, as a practical matter, application of common Article 3 by a State party to the American Convention involved in internal hostilities imposes no additional burdens on [a State], or disadvantages its armed forces vis-à-vis dissident groups. This is because Article 3 basically requires the State to do, in large measure, what it is already legally obliged to do under the American Convention.⁸⁵

While not exactly within its competence, the Commission decided to directly apply IHL. To justify its application of humanitarian law, the Commission affirmed that:

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 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.⁸⁶

Furthermore, the Commission considered that:

⁸⁴ [Juan Carlos Abella v. Argentina](#) (La Tablada), Inter-American Commission of Human Rights, 18 November 1997, par. 156.

⁸⁵ See par. 158.

⁸⁶ Par. 161.

as States Parties to the American Convention, these same states are also expressly required under Article 25 of the American Convention to provide an internal legal remedy to persons for violations by State agents of their fundamental rights “recognized by the constitution or laws of the state concerned or by this Convention”. Thus, when the claimed violation is not redressed on the domestic level and the source of the right is a guarantee set forth in the Geneva Conventions, which the State Party concerned has made operative as domestic law, a complaint asserting such a violation, can be lodged with and decided by the Commission under Article 44 of the American Convention. Thus, the American Convention itself authorizes the Commission to address questions of humanitarian law in cases involving alleged violations of Article 25.⁸⁷

Noting Article 29 (b) - the so-called "most-favorable-to-the-individual- clause" - of the American Convention, the Commission stated:

The purpose of this Article is to prevent States Parties from relying on the American Convention as a ground for limiting more favorable or less restrictive rights to which an individual is otherwise entitled under either national or international law. Thus, 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.⁸⁸

With respect to derogations from IHRL instruments (ie. Article 27 IACHR), it held:

When 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.⁸⁹

Effect of IHRL: In this case, it is upheld that IHL might provide better safeguards than IHRL. The Commission also asserted that IHL might fill an IHRL gap by, for example, defining or distinguishing civilians from combatants. On the other hand, using this IHRL monitoring body - Inter-American Commission of Human Rights - provided a forum for acknowledging that violations of IHL occurred.

⁸⁷ Par. 163.

⁸⁸ See par. 165. Article 29 (b) provides that no provision of the American Convention shall be interpreted as "restricting the enforcement or exercise of any right or freedom recognized by virtue of the laws of any State Party of another convention which one of the said states is a party."

⁸⁹ See par. 170.

8. The Afro-descendant Communities displaced from the Cacarica River (Operation Genesis) v. Colombia, Inter American Court of Human Rights (20 November 2013)

Facts: This case concerned the murder and forced displacement of members of a community of African descent fleeing from aerial and land-based bombardment during the counterinsurgency (Operation Genesis) carried out by the Colombian armed forces. The State indicated that Operation Genesis was a legitimate military operation; that it was planned, prepared, executed in accordance with IHL. The Commission indicated that the State had general and special duties to protect the civilian population under its care, derived from IHL.

Decision: The Court affirmed that:

since the events of this case took place in the context of a non-international armed conflict, the Court finds it useful and appropriate, as it has on other occasions, to interpret the scope of the treaty-based obligations in a way that is complementary with the provisions of international humanitarian law, bearing in mind the latter's specificity in this area [...].⁹⁰

The Court noted the importance of the IHL principles of distinction, proportionality and precaution in the use of force in the context of non-international armed conflicts.⁹¹ Furthermore, it paid special attention to the IHL framework applicable to internal displacement:

when situations of displacement occur in this type of conflicts, the regulations on displacement contained in Additional Protocol II are also particularly useful for the application of the American Convention. In this regard, Article 17 of this Protocol prohibits the displacement of the civilian population for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, "all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition."⁹²

It then added that with regards to these IHL norms:

recognition means not only that the State must respect them, but also requires that it adopt all appropriate measures to ensure them, in compliance with its general obligations established in Article 1(1) of the American Convention. Special duties derive from these general obligations, and they can be determined based on the specific needs of protection of the subject of law, due to either his personal situation or to the particular situation in

⁹⁰ [The Afro-descendant Communities displaced from the Cacarica River \(Operation Genesis\) v. Colombia](#), Judgment, Inter-American Court of Human Rights, 20 November 2013, par. 221.

⁹¹ See par. 222, it referred to Case of the Santo Domingo Massacre v. Colombia, par. 212, 214 and 216.

⁹² See par. 222.

which he finds himself. This entails the duty of the States to organize the whole government apparatus and, in general, all the structures by which public powers are implemented, so that they are able to ensure, legally, the free and full exercise of human rights. As part of this obligation, the State has the legal obligation 'to prevent, reasonably, human rights violations, and to investigate, seriously with the means available to it, the violations that have been committed within its sphere of jurisdiction in order to identify those responsible, impose the pertinent sanctions, and ensure adequate reparation for the victim.'⁹³

The Court found that Colombia violated inter alia Article 22(1) (Right to Move Freely Within a State) and Article 5(1) (Right to Physical, Mental, and Moral Integrity) in relation to Article 1(1) of the Convention, to the detriment of the displaced members of the Afro-descendant communities.

Effect of IHRL: The Court considered that it could directly apply IHL; thus, thanks to an IHRL body the adjudication of IHL violations was made possible. Moreover, it read *IHL core through the lens of IHRL positive and negative obligations*. Hence, *IHRL brought substantive obligation to IHL*.⁹⁴

9. Cyprus v. Turkey, European Commission of Human Rights, App. Nos. 6780/74 and 6950/75 (10 July 1976)

Facts: This is an inter-State case arising out of the Turkish invasion and occupation of northern Cyprus. Turkey had neither derogated nor declared a state of emergency in relation to Cyprus. One of the issues at stake was the legality of the detention of prisoners of wars by the Turkish army. The government of Cyprus raised the point that it was under occupation by Turkey; it however also submitted that the application of the ECHR was not excluded by Turkey's concurrent responsibility under IHL.

Decision: The Commission determined that, in the absence of a notice of derogation, detention of Greek Cypriot military personnel was per se a violation of Article 5(1) ECHR:

The Commission considers that the detention of Greek Cypriot military personnel in Turkey, which is clearly imputable to Turkey under the Convention, constituted a deprivation of liberty within the meaning of Art. 5 (1) of the Convention. Since it did not serve any of the purposes enumerated in sub-paragraphs (a) to (f) of this provision, the

⁹³ See par. 223.

⁹⁴ To be noted that IHL already contain positive obligations, via the duty to ensure respect under common Article 1 of the Geneva Conventions, but these obligations are generally interpreted with a more limited scope than under IHRL. See Happold, M. (2009) 'The Conference of High Contracting Parties to the Fourth Geneva Convention1', Yearbook of International Humanitarian Law, 4, pp. 399–402.

Commission concludes, by thirteen votes against one, that it was not in conformity with Art. 5 para. (1) of the Convention.⁹⁵

It then added:

The question whether any of the above deprivations of liberty, in particular the detention of military personnel as prisoners-of-war, were justified under Art. 15 of the Convention is reserved for consideration in Part III of this Report.⁹⁶

In Part III it was found that no communication had been made under Article 15 with regard with regard to the northern area of Cyprus. Thus, it concluded that:

it cannot, in the present case, apply Art. 15 of the Convention to the treatment by Turkey of Greek Cypriot Prisoners brought to and detained in Turkey.⁹⁷

On the other hand, it had not:

found it necessary to examine the question of a breach of Article 5 ECHR with regard to persons accorded the status of prisoners of war.⁹⁸

With regard to this last point, the Dissenting opinion of Mr Sperduti, joined by Mr Trechsel, argued that:

measures which are in themselves contrary to a provision of the European Convention but which are taken legitimately under the international law applicable to an armed conflict, are to be considered as legitimate measures of derogation from the obligations flowing from the Convention.⁹⁹

Effect of IHRL: The Commission provided a forum where human rights violations could be adjudicated as a result of an international armed conflict. Furthermore, it found that the detention of persons entitled to prisoners of war status was a violation of Article 5 (1) ECHR, unless a formal derogation was notified. Thus, *adding a procedural obligation to an IHL norm*.

⁹⁵ [Cyprus v. Turkey](#), App. Nos. 6780/74 and 6950/75, European Commission of Human Rights, 10 July 1976, par. 309.

⁹⁶ See par. 312.

⁹⁷ See par. 531.

⁹⁸ See par. 313.

⁹⁹ See par. 7.

10. Isayeva v. Russia, European Court of Human Rights, App. No. 57950/00 (24 February 2005)

Facts: This case relates to the aerial bombardment of a village followed by the bombardment of escaping civilians. Russia did not invoke IHL and the Court did not explicitly refer to IHL – it even said that it occurred “outside war time”. Nonetheless, the facts of the case show that the situation occurred within an internal armed conflict and that therefore IHL was applicable. Furthermore, the language used by the Court was sometimes similar to the terminology used in IHL (e.g. “military operation [...] aimed at either disarmament or destruction of the fighters”;¹⁰⁰ “was planned and executed with the requisite care for the lives of the civilian population”).¹⁰¹

Decision: With respect to the Russian military operation, the Court affirmed that:

it is necessary to examine whether the operation was planned and controlled by the authorities so as to minimize, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimized.¹⁰²

The Court found a violation of the right to life (art. 2 ECHR) as it did not accept that the operation:

was planned and executed with the requisite care for the lives of the civilian population.¹⁰³

In particular, it held that the massive use of indiscriminate weapons stands in flagrant contrast with the aim of an operation allegedly designed to defend the lives of the village population, which was said to have been taken hostage by a group of fighters:

The Court considers that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. No martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention [...]. The operation in question therefore has to be judged against a normal legal background. Even when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the

¹⁰⁰ Isayeva v. Russia, European Court of Human Rights, App. No. 57950/00, 24 February 2005, par. 188.

¹⁰¹ See par. 200; on terminology used by the ECtHR in this case see Gioia, Andrea. "The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict", in Ben-Naftali, *International Humanitarian Law and International Human Rights Law: Pas de deux* (Oxford University Press, 2011), p. 228-229.

¹⁰² See par. 175.

¹⁰³ See par. 200.

standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.¹⁰⁴

Furthermore, the Court affirmed that Russia should have warned the local population of the probable arrival of rebels in their village, a situation that exposed its population to all kinds of dangers:

The Court has been given no evidence to indicate that anything was done to ensure that information about these events was conveyed to the population before 4 February 2000, either directly or through the head of administration. However, the fact that the fighters could have reasonably been expected, or even incited, to enter Katyr-Yurt clearly exposed its population to all kinds of dangers. Given the availability of the above information, the relevant authorities should have foreseen these dangers and, if they could not have prevented the fighters' entry into the village, it was at least open to them to warn the residents in advance. The head of the village administration, whose role in communicating between the military and the residents of the village appears to have been perceived as a key one, was questioned only once and no questions were put to him about the circumstances of the fighters' arrival or about the organisation of a safe exit for residents.¹⁰⁵

Effect of IHRL: Under IHL a belligerent party to the conflict must give effective advance warning of attacks that may affect the civilian population, unless circumstances do not permit. However, this obligation lies mostly on the party planning to wage the attack. In the Isayeva case, the Court by using IHRL made it as an obligation lying on Russia to warn the residents in advance of the insurrection fighters' arrival. Hence, IHRL had *the effect of developing* the IHL obligation to warn the civilian population. This being said, it is important to keep in mind that since the State party did not invoke IHL, the Court did not explicitly refer to this branch. Hence, this case is more pertinently an IHRL case. Nonetheless, it is interesting to note that this situation was adjudicated in a law enforcement perspective while IHL was in the background. Thus, the non-invocation of IHL and, in particular, the applicability of IHRL without recourse to the *lex specialis*, maxim modifies States' conduct in armed conflicts.

¹⁰⁴ See par. 191.

¹⁰⁵ See par. 187.

The Effects of International Human Rights Law on International Criminal Law

The cases identified in this reader that deal with the effects of IHRL on international criminal law (ICL) all come from International Criminal Tribunals or Courts. Cases that concern transnational criminal law have not been included here as the focus is on ICL *stricto sensu*. Some of the cases selected refer to violations of international humanitarian law (IHL). Since these cases relate to the criminal accountability for such violations, we consider them to be ICL rather than IHL cases. The first four cases show the effects of human rights as diffused fundamental principles on international criminal law. They are cases of judicial creativity where IHRL constituted the main *ratio legis*. The *Furundzija* case is an example where the International Tribunal for the former Yugoslavia (ICTY) employed IHRL to justify its introduction of a new element to the definition of rape. Other cases are examples of direct judicial borrowing from IHRL to define an ICL norm. In the final case, the Tribunal is very cautious in not directly attributing its finding to IHRL but to its rule of procedure. However, the alignment of both was determinant in deciding to apply the latter.

1. Prosecutor v. Tadić, Decision on the defence motion for interlocutory appeal on jurisdiction, ICTY, Appeals Chamber, ICTY-94-1-AR72 (2 October 1995)

Facts: Dusko Tadic was accused of crimes against humanity and war crimes committed in the former Yugoslavia in the 1990's. He challenged the jurisdiction of the ICTY on various grounds including the violation of the sovereignty of Croatia and the jurisdiction of the Tribunal over crimes committed in a non-international armed conflict (NIAC). It is not clear whether the parties to the case or the Court *proprio motu* raised the various IHRL considerations to bring a new interpretation to the issues below.

Decision: The defendant claimed that by exercising primacy jurisdiction the Tribunal was violating the sovereignty of States. The Trial Chamber rejected this plea, holding among other reasons:

In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea

only a sovereign State may raise or waive and a right clearly the accused cannot take over from the State.¹⁰⁶

While this claim had also been rejected by the District Court of Jerusalem in Israel v. Eichmann, and in the United States of America in the matter of United States v. Noriega, the Appeals Chamber accepted that the defendant could make this plea as a component of the right to full defence:

Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.

Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.¹⁰⁷

Having accepted that the defendant could raise the breach of State sovereignty did not mean that this plea was granted:

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.¹⁰⁸

With respect to whether the Tribunal had jurisdiction over violations of IHL committed in non-international armed conflicts (NIACs), the Chamber concluded that Article 3 ICTY Statute covered these as:

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the

¹⁰⁶ [Prosecutor v. Tadic, Decision on the Defence Motion on Jurisdiction](#), Trial Chamber, IT-94-1, 10 August 1995, par. 41.

¹⁰⁷ See par. 55.

¹⁰⁸ See par. 58.

correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict.¹⁰⁹

It continued:

Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.¹¹⁰

Then, it considered that serious violations of IHL applicable to NIACs can give rise to individual criminal responsibility. To reach this conclusion, the Chamber declared that on the basis of the growing importance of IHRL, the dichotomy between international armed conflicts (IAC) and NIAC did not make sense.¹¹¹ In the words of the Chamber:

the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.¹¹²

Following the radical change IHRL brought to the international legal landscape, the Chamber held:

When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is

¹⁰⁹ See par. 87.

¹¹⁰ See par. 91.

¹¹¹ See par. 97.

¹¹² See par. 97.

rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.¹¹³

Having examined various forms of state practice and *opinio juris*, the Chamber found:

we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.¹¹⁴

Effect of IHRL: The procedural defence of violation of State sovereignty, grounded in international law, was brought in through the right to a full defence. Hence, IHRL brought a new component to the right to a fair trial by which the accused could avail him self of a defence that was originally reserved to States. By the same token, the development of IHRL also meant that the sovereignty of States could not unconditionally shield States from non-interference; in particular, jurisdiction over serious breaches of human rights and humanitarian law without the concerned State's consent.

With respect to the finding that violations of IHL committed in NIACs give rise to individual criminal responsibility, the Chamber came to this result by resorting to the technique of "modern custom" to find new norms to be existing under customary law. Such method for ascertaining customary international law (reliance is primarily placed on elements such as official pronouncements of States, military manuals and judicial decisions) was particularly justified in case of human rights norms. Hence, in this case, it appears that the Tribunal based on the need to ensure that IHRL was respected called for the application of a new rule of recognition for identifying customary international law, whereby more weight is given to *opinio juris* than to State practice.

Moreover, the Chamber attempted to fill a gap in its jurisdiction. Indeed, it conceived that Article 3 ICTY Statute was to "function[...] as a residual clause designed to ensure that no serious violation of IHL is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable." It is through the recognition that serious violation of IHL in NIACs give rise to individual criminal responsibility under customary international law that article 3 could indeed assume this "function". Thus, IHRL was used as

¹¹³ See par. 99.

¹¹⁴ See par. 129.

teleological tool to *fill the accountability gap* under international law for crimes committed in NIACs.

2. Prosecutor v. Kupreškić, Trial Judgment, ICTY, Trial Chamber, No. IT-95-16-T (14 January 2000)

Facts: Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Vladimir Šantić and Dragan Papić were accused of several war crimes and crimes against humanity (including persecution) committed in Bosnia-Herzegovina during the 1990's. During the proceedings, some witnesses alleged that the unlawful acts were potentially committed as reprisals to unlawful acts committed by the other side to the conflict. The Chamber decided at its own initiative to clarify the law applicable to reprisals in NIACs. The accused also raised the issue that the definition of inhumane acts and persecution were too vague and thus not in conformity with the principle *nullum crimen sine lege*.

Decision: The Trial Chamber found that a customary rule of international law has emerged on the prohibition of reprisals against civilians. It acknowledged that there was not enough State practice to assert that this customary rule existed under the traditional doctrine but that thanks to the Martens Clause the rules on the formation of custom were different in the present case:

there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.¹¹⁵

This was in part prompted by the necessity to ensure the human rights of civilians. In the words of the Chamber:

the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive

¹¹⁵ See par. 527.

influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. This trend towards the humanisation of armed conflict is amongst other things confirmed by the works of the United Nations International Law Commission on State Responsibility. Article 50(d) of the Draft Articles on State Responsibility, adopted on first reading in 1996, prohibits as countermeasures any “conduct derogating from basic human rights.”¹¹⁶

Thus the Chamber concluded:

Due to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged on the matter under discussion.¹¹⁷

Later in the judgment, the Chamber stated that there was a concern that the category of other inhumane acts as crimes against humanity lacks precision and thus be contrary to the principle of the “specificity” of criminal law. In order to identify the legal parameters for determining the content of the category of “inhumane acts”, the Tribunal directly resorted to IHRL instruments:

the interpretation of “other inhumane acts” can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity.¹¹⁸

As examples,

serious forms of cruel or degrading treatment of persons belonging to a particular ethnic, religious, political or racial group, or serious widespread or systematic manifestations of cruel or humiliating or degrading treatment with a discriminatory or persecutory intent no doubt amount to crimes against humanity: inhuman or degrading treatment is prohibited by the United Nations Covenant on Civil and Political Rights (Article 7), the European Convention on Human Rights, of 1950 (Article 3), the Inter-American Convention on Human Rights of 9 June 1994 (Article 5) and the 1984 Convention against Torture (Article 1). Similarly, the expression at issue undoubtedly embraces the forcible transfer of groups of civilians (which is to some extent covered by Article 49 of the IVth Convention of 1949 and Article 17(1) of the Additional Protocol II of 1977), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights), as well as the enforced disappearance of persons (prohibited by General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American Convention of 9 June 1994). Plainly, all these, and other similar acts, must be

¹¹⁶ See par. 529.

¹¹⁷ See par. 531.

¹¹⁸ See par. 566.

carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5.¹¹⁹

While searching for the definition of persecution under customary international law, the Chamber pointed out that:

the corpus of refugee law does not, as such, offer a definition of persecution. Nor does human rights law provide such a definition. The European Commission and the Court have on several occasions held that exposing a person to a risk of persecution in his or her country of origin may constitute a violation of Article 3 of the European Convention on Human Rights. However, their decisions give no further guidance as to the definition of persecution.¹²⁰

It thus concluded:

these cases cannot provide a basis for individual criminal responsibility. It would be contrary to the principle of legality to convict someone of persecution based on a definition found in international refugee law or human rights law. In these bodies of law the central determination to be made is whether the person claiming refugee status or likely to be expelled or deported has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”. The emphasis is more on the state of mind of the person claiming to have been persecuted (or to be vulnerable to persecution) than on the factual finding of whether

¹¹⁹ See par. 566; the chamber also stated in its footnote to this paragraph: “As for the specification of what constitutes cruel, degrading, humiliating or degrading treatment, resort can of course be had to the important case-law of the relevant international bodies, chiefly to the United Nations Torture Committee and the European Commission and Court of Human Rights. It is worth adding that resort to the standards laid down in the Universal Declaration of Human Rights has already been made in 1950 by a Belgian court. The Conseil de guerre of Brussels, in a judgment of 8 Feb. 1950, held that Art. 5 of the Universal Declaration, prohibiting torture and inhuman treatment can be utilised for the application of the so-called Marten's clause in the IVth Hague Convention of 1899. It noted, at p. 566, that “in searching for the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience, the Court-Martial is presently guided by the Universal Declaration of Human Rights ...” [D]ans la recherche des principes du droit des gens tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique, le Conseil de guerre est aujourd'hui guidé par la déclaration universelle des droits de l'homme [...]. After citing Art. 5 of the Declaration, the court went on to say that “[...] suspending a human being by his hands tied behind his back from a pulley specially rigged for the purposes is torture; [...] blows to the face, delivered so repeatedly and violently that they caused it to swell up and, in several cases, broke some teeth, constitute cruel treatment” (ibid.). ([L] a pendaison d'un être humain, par les mains liées derrière le dos, à une poulie spécialement aménagée à cet effet, est une torture; [...] des coups au visage, à ce point répétés et violents qu'ils l'ont tuméfié et dans plusieurs cas, ont brisé des dents, constituent un traitement cruel (in 30 Revue de droit pénal et de criminologie, 1949-50, p. 566).

¹²⁰ See par. 588. In its footnotes to the paragraph, the Chamber wrote among others: “The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, [...] states at par. 51: “There is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success. From Art. 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution”.”

persecution has occurred or may occur. In addition, the intent of the persecutor is not relevant.”¹²¹

Having referred to the definition adopted in Tadic Trial Judgment where it was held that persecution is a form of discrimination on grounds of race, religion or political opinion that is intended to be, and results in, an infringement of an individual's fundamental rights,¹²² the Chamber had now to identify what type of fundamental rights could be included:

drawing upon its earlier discussion of “other inhumane acts”, holds that in order to identify those rights whose infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law. Drawing upon the various provisions of these texts it proves possible to identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity. Persecution consists of a severe attack on those rights, and aims to exclude a person from society on discriminatory grounds. The Trial Chamber therefore defines persecution as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.¹²³

Effect of IHRL: Given the avowed need to ensure that IHRL be respected, the Tribunal called for the *application of a new rule of recognition for identifying customary international law*, whereby more weight is given to *opinio juris* than to State practice.¹²⁴ In this way, the Tribunal filled a gap in the protective purpose of IHL, which by not regulating reprisals in NIACs implicitly permitted attack on civilian population when undertaken as reprisals. Also, IHRL was used to interpret the catch-all provision of “other inhumane acts” as crimes against humanity. In the same vein, IHRL was used to interpret the definition of persecution, which was ultimately considered to consist of a severe attack on core human rights.

3. Prosecutor v. Zejnil Delalic et al., Trial Judgment, ICTY, Trial Chamber, IT-96–21-T (16 November 1998)

Facts: The accused were guards and commanders of a Bosnian Muslim and Bosnian Croat camp where Bosnia Serbs were killed and tortured during the former Yugoslavia conflict. They

¹²¹ See par. 589.

¹²² [Prosecutor v. Tadic](#), Trial Chamber Judgment, 7 May 1997, at paras. 697, 710.

¹²³ See par. 621.

¹²⁴ But note that the Martens clause was also used to trigger the doctrine of modern custom.

challenged the applicability of the Geneva Conventions (GC) on the basis that the victims were not ‘protected persons’ according to Article 4 of the Conventions. The Prosecutor responded to these arguments with reference to the emerging doctrine on the right under international law to the nationality of one’s own choosing, and the requirement of an effective link between a State and its nationals in order for the grant of nationality to be recognised on the international plane. Neither the prosecutor nor the defence seem to have referred to IHRL. Thus, the IHRL narrative to justify a broad interpretation of Article 4 GC appears to come from the Trial Chamber.

Decision: The Trial Chamber interpreted “of which they are not nationals” in Article 4 GC IV on the basis of the civilian allegiance to another entity, instead of their citizenship status under domestic law. Hence, the Geneva Convention applied and the Bosnian-Serbs ethnic were protected persons by GC IV even when in the hands of the Bosnian State. It pointed to many factor to justify this broad interpretation:

Bearing in mind the relative merits of the “effective link” and the “agency” approaches, this Trial Chamber wishes to emphasise the necessity of considering the requirements of article 4 of the Fourth Geneva Convention in a more flexible manner. The provisions of domestic legislation on citizenship in a situation of violent State succession cannot be determinative of the protected status of persons caught up in conflicts which ensue from such events. The Commentary to the Fourth Geneva Convention charges us not to forget that “the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests” and thus it is the view of this Trial Chamber that their protections should be applied to as broad a category of persons as possible. It would, indeed, be contrary to the intention of the Security Council, which was concerned with effectively addressing a situation that it had determined to be a threat to international peace and security, and with ending the suffering of all those caught up in the conflict, for the International Tribunal to deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship status under domestic law.¹²⁵

Most importantly, for the Trial Chamber:

This interpretation of the Convention is fully in accordance with the development of the human rights doctrine which has been increasing in force since the middle of this century. It would be incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of article 4, that was apparently inserted to prevent interference in a State’s relations with its own nationals. Furthermore, the nature of the international armed conflict in Bosnia and Herzegovina reflects the complexity of many modern conflicts and not, perhaps, the paradigm envisaged in 1949. In order to retain the relevance and

¹²⁵ [Prosecutor v. Zejnil Delalic et al.](#), Trial Judgment, ICTY, Trial Chamber, IT-96–21-T, 16 November 1998, par. 263.

effectiveness of the norms of the Geneva Conventions, it is necessary to adopt the approach here taken.¹²⁶

In order to find the definition of torture under customary international law, the Chamber drew from international human rights instruments:

the definition of torture contained in the Torture Convention includes the definitions contained in both the Declaration on Torture and the Inter-American Convention and thus reflects a consensus which the Trial Chamber considers to be representative of customary international law.¹²⁷

When considering the requisite level of severity of pain or suffering,¹²⁸ the existence of a prohibited purpose,¹²⁹ and the extent of the official involvement that are required in order for the offence of torture to be proven,¹³⁰ the Chamber relied extensively on the jurisprudence of human rights bodies. Thanks to this jurisprudence it found:

that the elements of torture, for the purposes of applying Articles 2 and 3 of the Statute, may be enumerated as follows:

(i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,

(ii) which is inflicted intentionally,

(iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,

(iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.¹³¹

Similarly, this jurisprudence was used to find that rape constituted torture:

¹²⁶ See par. 266; the paragraph also referred to Meron: “[i]n interpreting the law, our goal should be to avoid paralyzing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals.”; Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout*, 92 *American Journal of International Law* 236, 239 (1998).

¹²⁷ See par. 459.

¹²⁸ See par. 461-469; [Tshitenge Muteba v. Zaire](#), Communication No. 124/1982, 25 March 1983, Human Rights Committee, UN Official Records of the General Assembly, 22nd Session, Supplement No. 40, (1984), par. 10.2; [Setelich v. Uruguay](#), Communication No. 63/1979, Report of Human Rights Committee, 14th Session, par. 16.2; [Weinberger v. Uruguay](#), Communication No. 28/1978, Report of Human Rights Committee, 31st Session, par. 4; [The Greek Case](#), European Commission of Human Rights, App. No.3321/67, 3322/67, 3323/6, 3344/67, 4 October 1969; [Ireland v. The United Kingdom](#), App. No. 5310/71, European Court of Human Rights, 18 January 1978, par. 167; [Cariboni v. Uruguay](#), Communication No. 159/1983, Report of the Human Rights Committee, 31st Session, par. 4; [Aksoy v. Turkey](#), European Court of Human Rights, App. No. 21987/93, 18 December 1996; [Aydin v. Turkey](#), European Court of Human Rights, App. No. 23178/94, 25 September 1997.

¹²⁹ Par. 470-472.

¹³⁰ Par. 473-474.

¹³¹ See par. 494.

whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria.¹³²

The meaning of inhuman treatment was also found through the jurisprudence of human rights bodies:

inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.¹³³

Effect of IHRL: IHRL *imposed a new interpretation of existing IHL*. It also filled a gap in the grave breaches regime of IHL for persons that are victims of crimes committed by their own State in the context of an IAC.

4. Prosecutor v. Akayesu, Trial Judgment, ICTY, Trial Chamber, ICTR-96-4-T (2 September 1998)

Facts: Jean Paul Akayesu was charged with genocide; complicity in genocide; direct and public incitement to commit genocide; and extermination, murder, torture, rape, inhumane acts (crimes against humanity); and murder, cruel treatment and outrages upon personal dignity including rape (violations of the laws and customs of war) committed in Rwanda in 1994. He was the first accused charged with rape as an international crime. It is not clear from the judgment whether the definitions of rape and genocide detailed below were advocated by the Prosecution or whether they came at the Court's own initiative.

Decision: The Chamber considered that the definition of torture as a crime against humanity to be adopted was the one contained in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

¹³² See par. 496; see par. 478-493, where it drew from Annual Report of the Inter-American Commission on Human Rights, Report No. 5/96, Case No. 10.970, 1 March 1996 and [Aydin v. Turkey](#), European Court of Human Rights, App. No. 23178/94, 25 September 1997.

¹³³ See par. 543 and par. 534-542 where it referred to [Tyrer v. United Kingdom](#), App. No. 5856/72, 25 April 1978; [Aksoy v. Turkey](#), European Court of Human Rights, App. No. 21987/93, 18 December 1996; [Ireland v. The United Kingdom](#), App. No. 5310/71, 18 January 1978, par. 167; [Aydin v. Turkey](#), European Court of Human Rights, App. No. 23178/94, 25 September 1997; [A v. United Kingdom](#), European Court of Human Rights, App. No. 3455/05, 23 September 1998; [Tomasi v. France](#), European Court of Human Rights, App. No. 12850/87, 27 August 1992, par. 115; [Ribitsch v. Austria](#), European Court of Human Rights, App. No. 18896/91, 4 December 1996; [Yagiz v. Turkey](#), European Court of Human Rights, App. No. 31834/96 30 October 2001; [The Greek Case](#), European Commission of Human Rights, App. No. 3321/67, 3322/67, 3323/6, 3344/67, 4 October 1969; [Chahal v. United Kingdom](#), European Court of Human Rights, App. No. 22414/93, 15 November 1996; General Comment of the Human Rights Committee 20/44 of 3 April 1992, [Portorreal v. Dominican Republic](#), Communication No. 188/1984, Human Rights Committee, 43th Session; [Tshisekedi v. Zaire](#), Communication No. 242/1987, Human Rights Committee, 37th Session; [Soriano de Bouton v. Uruguay](#), Communication No. 37/1978, Human Rights Committee, 36th Session;

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹³⁴

As the Chamber was about to define rape for the first time in international law, it noted its important role:

Considering the extent to which rape constitute crimes against humanity, pursuant to Article 3(g) of the Statute, the Chamber must define rape, as there is no commonly accepted definition of this term in international law.¹³⁵

It then observed that rape was proximate to torture:

The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹³⁶

Without surveying whether national legislations defining rapes had common features, it defined:

rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.¹³⁷

With respect to the definition of genocide, the Tribunal developed the ‘permanent and stable’ criteria to assess whether a group fits in the protected groups of the Genocide Convention.

whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the

¹³⁴ [Prosecutor v. Akayesu](#), Trial Judgment, ICTY, Trial Chamber, ICTR-96-4-T (2 September 1998), par. 593.

¹³⁵ See par. 596.

¹³⁶ See par. 597.

¹³⁷ See par. 598.

four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the travaux préparatoires, was patently to ensure the protection of any stable and permanent group.¹³⁸

Effect of IHRL: The definition of rape the Tribunal provided was purposefully a broad one in order not to exclude certain acts and thus to give full protection to the most vulnerable victims. The Tribunal took example from the Convention against Torture, thereby providing a conceptual framework to define the sanctioned conduct. Similarly, the definition of protected group by the Genocide Convention as interpreted by the Trial Chamber aimed to protect against discrimination of the most vulnerable groups. To sum up, the Tribunal adopted the logic of IHRL to provide new definitions of rape and of the groups protected by the Genocide Convention.

5. Prosecutor v. Furundžija, Trial Judgment, ICTY, Trial Chamber, IT-95-17/1-T (10 December 1998)

Facts: Furundžija was accused of torture, outrages upon personal dignity, including rape as violations of the laws or customs of war committed during the conflict in the former Yugoslavia in the 1990's. It is not clear from the judgment whether the method to bring in IHRL considerations in its reasoning were at the initiative of the Court or were firstly raised by one of the parties to the proceedings.

Decision: The Chamber decided to modify the definition of rape developed in Prosecutor v. Akayesu. It considered that:

to arrive at an accurate definition of rape based on the criminal law principle of specificity (*Bestimmtheitsgrundsatz*, also referred to by the maxim “*nullum crimen sine lege stricta*”), it is necessary to look for principles of criminal law common to the major legal systems of the world.¹³⁹

It then considered that:

in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.¹⁴⁰

With respect to oral penetration, it acknowledged:

¹³⁸ See par. 516.

¹³⁹ Prosecutor v. Furundžija, Trial Judgment, ICTY, Trial Chamber, IT-95-17/1-T, 10 December 1998, par. 177.

¹⁴⁰ See par. 181.

A major discrepancy may, however, be discerned in the criminalisation of forced oral penetration: some States treat it as sexual assault, while it is categorised as rape in other States. Faced with this lack of uniformity, it falls to the Trial Chamber to establish whether an appropriate solution can be reached by resorting to the general principles of international criminal law or, if such principles are of no avail, to the general principles of international law.¹⁴¹

It considered that oral penetration had to be included since:

the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well-being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.¹⁴²

Applying the human dignity principle, it established a new definition of rape, the objective elements of which included:

(1) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (2) by coercion or force or threat of force against the victim or a third person.¹⁴³

To include torture within the type of conduct that constituted serious violations of the laws and customs of war, the ICTY referred extensively to IHRL position on torture. In this respect, it noted:

the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on this ground the prohibition also applies to situations of armed conflicts). This is linked to the fact, discussed below, that the prohibition on torture is a peremptory norm or *jus cogens*. This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.¹⁴⁴

¹⁴¹ See par. 182.

¹⁴² See par. 183.

¹⁴³ See par. 185.

¹⁴⁴ See par. 144.

With regards to the definition of torture:

International humanitarian law, while outlawing torture in armed conflict, does not provide a definition of the prohibition. Such a definition can instead be found in article 1(1) of the 1984 Torture Convention.¹⁴⁵

The Chamber considered that:

while the definition referred to above applies to any instance of torture, whether in time of peace or of armed conflict, it is appropriate to identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts.¹⁴⁶

The elements of torture in an armed conflict were thus held to be:

- (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
- (ii) this act or omission must be intentional;
- (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
- (iv) it must be linked to an armed conflict;¹⁴⁷

Taking account of IHL's purposes, the Chamber found that intimidation is one of the purposes of torture; and, conversely, referring to IHRL that rape can be a form of torture.¹⁴⁸

Effect of IHRL: The Chamber discarded the vague definition of rape adopted in Prosecutor v. Akayesu on the ground that the latter did not satisfy the principle of specificity, *nullum crimen sine lege certa*. By the same token, the Tribunal via IHRL found the *ratio legis* to give a new interpretation of rape. This new interpretation was based on the "general principle of respect for human dignity" which justified that such an extremely serious sexual outrage as forced oral penetration be classified as rape. IHRL was also used as a justification to confirm that rape could be qualified as an act of torture.

¹⁴⁵ See par. 159.

¹⁴⁶ See par. 162.

¹⁴⁷ See par. 162.

¹⁴⁸ See par. 162-164.; for rape as a form of torture it referred in particular to Human Rights Committee, General Comment No. 20 on Art. 7 of the ICCPR; Aksoy v. Turkey, European Court of Human Rights, App. No. 21987/93, 18 December 1996; Aydin v. Turkey, European Court of Human Rights, App. No. 23178/94, 25 September 1997, paras. 62-88; Fernando and Raquel Mejia v. Peru (Decision of 1 March 1996), Report No. 5/96, case no 10.970, in Annual Report of the Inter-American Commission on Human Rights 1995 OEA/Ser.L/V/II.91, p. 182-188; Report of 1986 (Special Rapporteur P. Kooijmans, E/CN.4/1986/15, p. 29-30) and the Report of 1995 (Special Rapporteur N. Rodley, E/CN.4/1995/34, p. 8-10).

6. Prosecutor v. Nahimana et al., Trial Judgment, ICTR, Trial Chamber, ICTR-99-52-T (3 December 2003)

Facts: The defendants had inter alia collaborated in the founding of Radio-Television Libre des Mille Collines (RTL), Kangura, a wide-reaching Rwandan newspaper, and the exclusively-Hutu Coalition pour la Défense de la République (CDR). These led a campaign of violence against the Tutsi population and its supporters. The defendants were charged with incitement to genocide. It is not clear if the vast reference to IHRL case law was due to the Prosecutor's pleadings or came from the Court's own motion. The counsel for the defence, on the other hand, referred to United States' case law on free speech.

Decision: The Tribunal found RTL, Kangura and CDR to have had a major role in the Rwandan genocide through their constant hate propaganda. The Court considered that a review of international law on incitement to discrimination and violence was helpful as a guide to the assessment of criminal accountability for direct and public incitement to genocide, in light of the fundamental right of freedom of expression:

International law protects both the right to be free from discrimination and the right to freedom of expression. The Universal Declaration of Human Rights provides in Article 7 that "All are entitled to equal protection against any discrimination . . . and against any incitement to such discrimination." Article 19 states: "Everyone has the right to freedom of opinion and expression." Both of these principles are elaborated in international and regional treaties, as is the relation between these two fundamental rights, which in certain contexts may be seen to conflict, requiring some mediation.¹⁴⁹

The Court drew heavily on IHRL jurisprudence on incitement to discrimination and violence (hate speech) in order to single out the factors to be considered in defining elements of 'direct and public incitement to genocide' as applied to mass media:

At the regional level, the European Convention on Human Rights has given rise to extensive jurisprudence on the proper balancing of the right to freedom of expression, guaranteed by Article 10(1) of the Convention, and the right to restrict such freedom inter alia "in the interests of national security" and "for the protection of the reputation or rights of others", pursuant to Article 10(2) of the Convention. The approach to this balancing test, much like the one used for the ICCPR, review (i) whether the restrictions are prescribed by law; (ii) whether their aim is legitimate; and (iii) whether they can be considered necessary in a democratic society, taken to imply the existence of a "pressing social need" and an intervention "proportionate to the legitimate aims pursued". While the language of Article 10 of the European Convention is comparable to the language of

¹⁴⁹ [Prosecutor v. Nahimana et al.](#), Trial Judgment, ICTR, Trial Chamber, ICTR-99-52-T (3 December 2003), par. 983.

Article 19 of the ICCPR, the European Convention has no provision comparable to Article 20 of the ICCPR, prohibiting incitement of discrimination, hostility or violence based on national, racial or religious grounds. Nevertheless, many of the cases that have been adjudicated by the European Court of Human Rights under Article 10 arise in connection with national laws that prohibit such incitement.¹⁵⁰

Having examined IHRL jurisprudence on incitement to discrimination and violence, the Tribunal found that a number of central principles emerge from it. Firstly,

Editors and publishers have generally been held responsible for the media they control. In determining the scope of this responsibility, the importance of intent, that is the purpose of the communications they channel, emerges from the jurisprudence – whether or not the purpose in publicly transmitting the material was of a bona fide nature (e.g. historical research, the dissemination of news and information, the public accountability of government authorities). The actual language used in the media has often been cited as an indicator of intent.”¹⁵¹

Secondly,

the jurisprudence on incitement highlights the importance of taking context into account when considering the potential impact of expression.¹⁵²

And, thirdly,

In considering whether particular expression constitutes a form of incitement on which restrictions would be justified, the international jurisprudence does not include any specific causation requirement linking the expression at issue with the demonstration of a direct effect.¹⁵³

¹⁵⁰ See par. 991; in paragraphs 985- 990, the Tribunal analysed the following Human Rights Committee’s views and general comments: [Ross v. Canada](#), Communication No. 736/1997, Human Rights Committee, 18 October 2000; Human Rights Committee, General Comment No. 10; [J.R.T. and the W.G. Party v. Canada](#), Communication No. 104/1981, Human Rights Committee, declared inadmissible 6 April 1983; [Robert Faurisson v. France](#), Communication No. 550/1996, Human Rights Committee, 19 July 1995; in paragraph 992-999 the Tribunal analysed the following ECtHR’s cases: [Jersild v. Denmark](#), European Court of Human Rights, App. No. 15890/89, 22 August 1994; [Zana v. Turkey](#), European Court of Human Rights, App. No. 18954/91, 25 November 1997; [Incal v. Turkey](#), European Court of Human Rights, App. No. 22678/93, 9 June 1998; [Arslan v. Turkey](#), European Court of Human Rights, App. No. 23462/94, 8 July 1999; [Süreş and Özdemir v. Turkey](#), European Court of Human Rights, App. Nos. 23927/94 and 24277/94, 8 July 1999; [Süreş v. Turkey \(No.1\)](#), European Court of Human Rights, App. No. 26682/95, 8 July 1999.

¹⁵¹ See par. 1001, in this section titled “purpose” – paragraphs 1001-1003 - the Tribunal referred back to [Robert Faurisson v. France](#); [Jersild v. Denmark](#); [Süreş v. Turkey \(No.1\)](#); [Süreş and Özdemir v. Turkey](#).

¹⁵² See par. 1004, in this section titled “content” – paragraphs 1004-1006 - the Tribunal referred back to [Robert Faurisson v. France](#), [Robert Faurisson v. France](#), [Incal v. Turkey](#), [Arslan v. Turkey](#).

¹⁵³ See par. 1007, in this section titled “causation” – paragraphs 1007- 1110 – the Tribunal referred back to the Turkish cases and the [Streicher](#) case from the Nuremberg Tribunal.

The principles of purpose, context and causation were thus extracted from IHRL case law.¹⁵⁴ With respect to the ECtHR case law, the Tribunal noted:

the Chamber considers that the “wider margin of appreciation” given in European Court cases to government discretion in its restriction of expression that constitutes incitement to violence should be adapted to the circumstance of this case. At issue is not a challenged restriction of expression but the expression itself. Moreover, the expression charged as incitement to violence was situated, in fact and at the time by its speakers, not as a threat to national security but rather in defence of national security, aligning it with state power rather than in opposition to it. Thus there is justification for adaptation of the application of international standards, which have evolved to protect the right of the government to defend itself from incitement to violence by others against it, rather than incitement to violence on its behalf against others, particularly as in this case when the others are members of a minority group.¹⁵⁵

One of the defence counsels argued that United States case law on free speech should be used as a standard. The Chamber held that it:

considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards.¹⁵⁶

Effects of IHRL: This is an instance of “legal borrowing” from IHRL, which contributed to an expansion of the definition of “incitement to genocide”. In particular, while extensively drawing on human rights provisions and jurisprudence on hate speech, the Trial Chamber omitted to clearly distinguish hate speech from incitement to genocide; thus, rendering incitement to genocide proximate to the proscription of hate speech. The Appeals Chamber, nevertheless, considered that a distinction had somehow been drawn.¹⁵⁷

¹⁵⁴ The Tribunal also made some references while assessing the principle of causation to the Nuremberg judgment, see par. 1007.

¹⁵⁵ See par. 1009.

¹⁵⁶ See par. 1010.

¹⁵⁷ Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, Appeals Judgment, ICTY, Appeals Chamber, ICTR-99-52-T (28 November 2007), par. 696.

7. Prosecutor v. Katanga and Chui, Decision on an Amicus Curiae application and on the ‘Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile’ (articles 68 and 93(7) of the Statute), ICC, Trial Chamber II, ICC-01/04-01/07-3003-tENG) (9 June 2011)

Facts: During the Katanga Trial, the defence called before the International Criminal Court (ICC) four witnesses in DRC’s custody. When transferred to The Hague and held in custody in The Netherlands they filed proceedings as asylum seekers. The counsel of the witnesses claimed that their clients could not be returned to their home state as provided by the Rome Statute since there were high risk that they would face torture. He referred to IHRL and called the Court to adopt a special protective measure within the meaning of rule 88 of the Rules of Procedure and Evidence. The defence counsel argued that the Court was bound by IHRL and thus had to protect the witnesses. The Prosecutor as well as the registry argued that the witnesses had to be returned to DRC. The Dutch authorities were of the opinion that the witnesses were under the Court’s jurisdiction.

Decision: First, the Trial Chamber discarded the argument raised by The Netherlands that the Court had to conduct the *non-refoulement* assessment:

Admittedly, as an international organisation with a legal personality, the Court cannot disregard the customary rule of non-refoulement. However, since it does not possess any territory, it is unable to implement the principle within its ordinary meaning, and hence is unlikely to maintain long- term jurisdiction over persons who are at risk of persecution or torture if they return to their country of origin. In the Chamber’s view, only a State which possesses territory is actually able to apply the non-refoulement rule. Furthermore, the Court cannot employ the cooperation mechanisms provided for by the Statute in order to compel a State Party to receive onto its territory an individual invoking this rule. Moreover, it cannot prejudge, in lieu of the Host State, obligations placed on the latter under the non-refoulement principle. In this case, it is therefore incumbent upon the Dutch authorities, and them alone, to assess the extent of their obligations under the non-refoulement principle, should the need arise.¹⁵⁸

¹⁵⁸ Prosecutor v. Katanga and Chui, Decision on an Amicus Curiae application and on the ‘Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile’ (articles 68 and 93(7) of the Statute), ICC, Trial Chamber II, ICC-01/04-01/07-3003-tENG), 9 June 2011, par. 64.

The Chamber noted that the principle of *non-refoulement* was a customary international human rights norm:

The “non-refoulement” principle is considered to be a norm of customary international law and is an integral part of international human rights protection. All individuals are entitled to enjoy its application by a State.¹⁵⁹

Then it took note of the importance of the principle of effective remedy:

In addition to the aforementioned right to apply for asylum, the Chamber must also pay particular attention to the right to effective remedy, as enshrined inter alia in article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 13 of the European Convention on Human Rights, article 7 of the African Charter of Human and Peoples’ Rights, and article 25 of the American Convention on Human Rights. The Chamber cannot disregard this fundamental rule and stresses that, in order for the asylum procedure to be effective, there must be open recourse to it, both in law and in practice, and that there must be no obstacles to the entering of an application for asylum as a result of acts or omissions that may be imputed to the Court.¹⁶⁰

Due to Article 21(3) of the Rome Statute, the Chamber had to ensure that the right to an effective remedy be respected:

As provided in article 21(3) of the Statute, the Chamber must apply all of the relevant statutory or regulatory provisions in such a way as to ensure full exercise of the right to effective remedy, which is clearly derived from internationally recognised human rights.¹⁶¹

The Trial Chamber considered that the immediate return of the three detained witnesses to the DRC was in conflict with their right to have their asylum request processed:

As matters stand, the Chamber is unable to apply article 93(7) of the Statute in conditions which are consistent with internationally recognised human rights, as required by article 21(3) of the Statute. If the witnesses were to be returned to the DRC immediately, it would become impossible for them to exercise their right to apply for asylum and they would be deprived of the fundamental right to effective remedy. Furthermore, were the Chamber to decide to oblige the Host State to cooperate with the Court in order to return the witnesses to the DRC immediately by transporting them to the airport, it would be

¹⁵⁹ See par. 68. The Chamber referred to, inter alia, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, UN High Commissioner for Refugees, 26 January 2007, and to all the international human rights instruments where the principle of *non-refoulement* was enshrined, par. 67.

¹⁶⁰ See par. 69.

¹⁶¹ See par. 70.

constraining the Netherlands to violate the witnesses' rights to invoke the non-refoulement principle.¹⁶²

It thus decided:

to delay the return of the three detained witnesses, insofar as the issue of their protection within the meaning of article 68 of the Statute has not yet been resolved, and as their return "without delay" would breach internationally recognised human rights.¹⁶³

However, more than two years later the Appeals Chamber overturned the decision on the following two grounds. First,

article 21 (3) of the Statute requires that article 93 (7) of the Statute be applied and interpreted in conformity with internationally recognised human rights; it does not require the Court to violate its obligations pursuant to article 93 (7) (b) of the Statute. Furthermore, such an interpretation would seriously damage the Court's ability to enter into future cooperation agreements with States, which would undermine the Court's ability to obtain needed testimony and evidence and render it more difficult to establish the truth in the cases before it.¹⁶⁴

And, second,

the Appeals Chamber considers that the Court's authority to detain individuals is limited to situations where the detention is related to judicial proceedings before the Court. The Court cannot serve as an administrative detention unit for asylum seekers or persons otherwise involved in judicial proceedings with the Host State or any other state. The Appeals Chamber does not consider that article 21 (3) of the Statute requires, or even permits, the Court to detain individuals beyond what is provided in the Statute. Furthermore, such an interpretation would raise other serious concerns, including potentially interfering with the Host State's domestic asylum proceedings.¹⁶⁵

The Appeals Chamber then considered that it was possible to apply Article 93(7) without violating the detained witnesses' right to an effective remedy from The Netherlands with respect to their asylum claims:

the Appeals Chamber notes that rule 192 of the Rules of Procedure and Evidence, as well as article 44 of the Headquarters Agreement between the International Criminal Court and the Host State [...]regulate the transport of individuals in the custody of the Court. Under

¹⁶² See par. 73.

¹⁶³ See par. 79.

¹⁶⁴ [Prosecutor v. Katanga and Chui](#), Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute, ICC, Appeals Chamber, ICC- 01/04- 01/07 ICC.01/04.02/12 A, 20 January 2014, par. 26.

¹⁶⁵ See par. 27.

these provisions and in the course of the implementation of article 93 (7) (b) of the Statute, the Detained Witnesses will be under the control and in the physical custody of The Netherlands. Accordingly, the Appeals Chamber considers that it is for The Netherlands to determine whether the Detained Witnesses' asylum claims make it necessary for it to intervene in order to take control of the Detained Witnesses until their respective claims have been finally adjudicated. In this regard, the Appeals Chamber acknowledges that The Netherlands may be faced with conflicting obligations, namely those with the Court, pursuant to the Headquarters Agreement, and those pursuant to The Netherlands' international and domestic legal obligations in relation to the pending asylum claims. However, the Appeals Chamber is firmly of the view that the resolution of these conflicting obligations lies with The Netherlands. In this respect, the Appeals Chamber stresses that article 21 (3) of the Statute does not require the Court to interpret its legal texts so as to avoid situations where The Netherlands may consider it necessary to take independent steps in order to fulfil its own legal obligations in relation to the Detained Witnesses.¹⁶⁶

Effect of IHRL: According to the Trial Chamber, IHRL *imposed substantive obligations upon the Court*, which *qualified article 93 (7) Rome Statute* (“The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State”). Article 93 (7) was thus qualified as the Chamber considered that it had to delay the return of the three detained witnesses, until their hearing in the Netherlands takes place. The Appeals Chamber however reversed this finding and held that it was for The Netherlands to determine whether it is necessary to intervene based on its own obligations in relation the Detained Witnesses’ asylum claims. Hence, article 93 (7) could be applied.

8. Prosecutor v. Kunarac, Kovač and Vuković, Trial Judgment, ICTY, Trial Chamber, IT-96-23-T & IT-96-23/1-T (22 February 2001)

Facts: The three accused were charged *inter alia* with torture as a violation of the laws and customs of war and as a crime against humanity. It is not clear from the judgment whether IHRL references were at the initiative of the Court or were firstly raised by one of the parties to the proceedings.

Decision: In this case, the Trial Chamber draws largely from the definition of torture as contained in the Convention against Torture as an IHRL instrument. As the Trial Chamber notes previous ICTY chambers had already adopted this approach:

¹⁶⁶ See par. 29.

Because of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law.¹⁶⁷

With respect to IHL, the Tribunal noted:

The absence of an express definition of torture under international humanitarian law does not mean that this body of law should be ignored altogether. The definition of an offence is largely a function of the environment in which it develops. Although it may not provide its own explicit definition of torture, international humanitarian law does provide some important definitional aspects of this offence.¹⁶⁸

It then added:

In attempting to define an offence under international humanitarian law, the Trial Chamber must be mindful of the specificity of this body of law. In particular, when referring to definitions which have been given in the context of human rights law, the Trial Chamber will have to consider two crucial structural differences between these two bodies of law [...].¹⁶⁹

Firstly,

the role and position of the state as an actor is completely different in both regimes. Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities.

In the human rights context, the state is the ultimate guarantor of the rights protected and has both duties and a responsibility for the observance of those rights. In the event that the state violates those rights or fails in its responsibility to protect the rights, it can be called to account and asked to take appropriate measures to put an end to the infringements.

In the field of international humanitarian law, and in particular in the context of international prosecutions, the role of the state is, when it comes to accountability, peripheral. Individual criminal responsibility for violation of international humanitarian law does not depend on the participation of the state and, conversely, its participation in the commission of the offence is no defence to the perpetrator. Moreover, international humanitarian law purports to apply equally to and expressly bind all parties to the armed

¹⁶⁷ [Prosecutor v. Kunarac, Kovač and Vuković](#), Trial Judgment, ICTY, Trial Chamber, IT-96-23-T & IT-96-23/1-T, 22 February 2001, par. 467.

¹⁶⁸ See par. 469.

¹⁶⁹ See par. 470.

conflict whereas, in contrast, human rights law generally applies to only one party, namely the state involved, and its agents.¹⁷⁰

Secondly,

that part of international criminal law applied by the Tribunal is a penal law regime. It sets one party, the prosecutor, against another, the defendant. In the field of international human rights, the respondent is the state. Structurally, this has been expressed by the fact that human rights law establishes lists of protected rights whereas international criminal law establishes lists of offences.¹⁷¹

Having surveyed all IHRL instruments and relevant case law that addressed the prohibition of torture,¹⁷² the Trial Chamber decided not to include one of the fundamental elements of the Convention against Torture:

The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.¹⁷³

Thus, the Trial Chamber held that:

in the field of international humanitarian law, the elements of the offence of torture, under customary international law are as follows:

- (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
- (ii) The act or omission must be intentional.
- (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.¹⁷⁴

¹⁷⁰ See par. 470.

¹⁷¹ See par. 470.

¹⁷² See par. 473-483, the Tribunal referred in particular to [Ireland v. The United Kingdom](#), European Court of Human Rights, App. No. 5310/71, 18 January 1978; [The Greek Case](#), European Commission of Human Rights, App. No. 3321/67, 3322/67, 3323/6, 3344/67, 4 October 1969, par. 186; [Costello-Roberts v. United Kingdom](#), European Court of Human Rights, App. No. 13134/87, 25 Mar 1993, par. 27-28; [HLR v. France](#), European Court of Human Rights, App. No. 24573/94, 29 Apr 1997, par. 40; and [A. v. United Kingdom](#), European Court of Human Rights, App. No. 25599/94, 23 Sept 1998, par. 22; General Comment 7/16 of 27 July 1982, Prohibition of Torture; General Comment 20/44 of 3 April 1992, Prohibition of Torture. It also referred to [Prosecutor v. Furundžija](#), Trial Judgment, ICTY, Trial Chamber, IT-95-17/1-T, 10 December 1998; [Prosecutor v. Akayesu](#), Trial Judgment, ICTY, Trial Chamber, ICTR-96-4-T, 2 September 1998; [Prosecutor v. Zejnil Delalic et al.](#), Trial Judgment, ICTY, Trial Chamber, IT-96-21-T, 16 November 1998.

¹⁷³ See par. 496.

¹⁷⁴ See par. 497.

With respect to the crime of enslavement, the Chamber considered that, as it was not defined under the Statute:

It is therefore necessary to look to various sources that deal with the same or similar subject matter, including international humanitarian law and human rights law.¹⁷⁵

In order to define enslavement, the Chamber looked at various sources, including IHRL instruments and relevant case law of the ECtHR, the Convention to Suppress the Slave Trade and Slavery, the Nuremberg Judgment, the Tokyo Judgment, various IHL provisions, and the Draft Code of Crimes Against the Peace and Security of Mankind.¹⁷⁶

Effect of IHRL: In this case, IHRL was used to provide a part of the definition of the crime of torture but with adaptation to the field of law (i.e. ICL) in which it was to be applied, thus stripping one of the elements out from the definition as contained in the Convention against Torture. IHRL was also used as a source from which the Tribunal could draw inspiration to define slavery.

9. Prosecutor v. Aleksovski, Trial Judgment, ICTY, Trial chamber, IT-95-14/1-T (25 June 1999)

Facts: Zlatko Aleksoski was charged with committing inter alia the war crime of outrages upon personal dignity during the conflict in the former Yugoslavia in the 1990's. It is not clear from the judgment whether the reference to IHRL on inhuman treatment to define 'outrages upon personal dignity' was proposed by the Prosecutor or came at the initiative of the Tribunal.

Decision: The Tribunal had to define the prohibition on 'outrages upon personal dignity', which is found in sub-paragraph (1)(c) of Article 3 common to the four Geneva Conventions (GC). The Chamber found that the GC provision had to be considered as a general proscription of inhumane treatment. Having noted the work of the International Committee of the Red Cross and the findings of the ICTY Trial Chamber in Delalic et al., the Chamber observed:

It is also instructive to recount the general definition of the term "inhuman treatment" propounded by the ECHR, which to date is the only human rights monitoring body that defined the term: "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (ECHR). The assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of

¹⁷⁵ See par. 518.

¹⁷⁶ See par. 519-543.

health of the victim, etc. The test offered by this definition is the level of suffering endured by the victim.¹⁷⁷

It added:

An outrage upon personal dignity within Article 3 of the Statute is a species of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within the genus. It is unquestionable that the prohibition of acts constituting outrages upon personal dignity safeguards an important value. Indeed, it is difficult to conceive of a more important value than that of respect for the human personality. It can be said that the entire edifice of international human rights law, and of the evolution of international humanitarian law, rests on this founding principle. Protection of the individual from inhuman treatment certainly is a basic principle referred to in the Universal Declaration of Human Rights of 1948 (Article 5), and also finds expression in prohibitions contained in regional and international human rights instruments, culminating in the General Assembly's adoption by consensus of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1984. In addition, guarantees against torture, cruel and other inhuman treatment are found in the constitutions and legislation of most countries.¹⁷⁸

Effect of IHRL: The Trial Chamber was inspired by the ECtHR definition of 'inhumane treatment' to define the offence of 'outrages upon person dignity' listed in the ICTY Statute.

10. Prosecutor v. Jean Bosco Barayagwiza, Decision, ICTR, Appeals Chamber, ICTR-97-19-AR72 (3 November 1999)

Facts: This case concerns the arrest and detention of the Barayagwiza during a nineteen-month period between 15 April 1996, when he was initially detained in Cameroon, and 19 November 1997, when he was transferred to the Tribunal's detention. Following his transfer, his initial appearance did not take place until 23 February 1998. From his detention in Cameroon, Barayawigza filed motions invoking IHRL to challenge the legality of his arrest and detention.

Decision: Firstly, the Appeals Chamber considered that the applicable law included IHRL:

The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European

¹⁷⁷ [Prosecutor v. Aleksovski](#), Trial Judgment, ICTY, Trial chamber, IT-95-14/1-T, 25 June 1999, par. 53, the quotation within the paragraph is from ECtHR, [Ireland v. The United Kingdom](#), European Court of Human Rights, App. No. 5310/71, 18 January 1978, p. 14.

¹⁷⁸ See par. 54; the Tribunal referred to [Ribitsch v. Austria](#), European Court of Human Rights, App. No. 18896/91, 4 December 1995, par. 38; [Tekin v. Turkey](#), European Court of Human Rights, App. No. 52/1997/836/1042, 9 June 1998, at par. 52-53.

Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.¹⁷⁹

Then, the Appeals Chamber recognised:

that international standards view provisional (or pre-trial) detention as an exception, rather than the rule. However, in light of the gravity of the charges faced by accused persons before the Tribunal, provisional detention is often warranted, so long as the provisions of Rule 40 and Rule 40*bis* are adhered to. The issue, therefore, is whether the length of time the Appellant spent in provisional detention, prior to the confirmation of his indictment, violates established international legal norms for provisional detention of suspects.¹⁸⁰

Thus, it considered IHRL norms regarding pre-trial detention:

It is well-established under international human rights law that pre-trial detention of suspects is lawful, as long as such pre-trial detention does not extend beyond a reasonable period of time. The U.N. Human Rights Committee, in interpreting Article 9(2) of the ICCPR, has developed considerable jurisprudence with respect to the permissible length of time that a suspect may be detained without being charged.¹⁸¹

Having considered IHRL case law regarding the period before the transfer, the Appeals Chamber held:

that the length of time that the Appellant was detained in Cameroon at the behest of the Tribunal without being indicted violates Rule 40*bis* and established human rights jurisprudence governing detention of suspects.¹⁸²

The Chamber then considered applying the abuse of process doctrine.¹⁸³ It specified:

It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction

¹⁷⁹ [Prosecutor v. Jean Bosco Barayagwiza](#), Decision, ICTR, Appeals Chamber, ICTR-97-19-AR72, 3 November 1999, par. 40.

¹⁸⁰ See par. 62.

¹⁸¹ Par. 63, see also par. 64; the Chamber referred in particular to [Glenford Campbell v. Jamaica](#), Communication No. 248/1987, Human Rights Committee, 30 March 1992; [Mariana Hernández Valentini de Bazzano v. Uruguay](#), Communication No. 5/1977, Human Rights Committee, 15 August 1979; [Monja Jaona v. Madagascar](#), Communication No. 132/1982, 1 April 1985; [Alba Pietrarola v. Uruguay](#), Communication No. 44/1979, Human Rights Committee, 27 March 1981; [Leopoldo Buffo Carballal v. Uruguay](#), Communication No. 33/1978, 27 March 1981.

¹⁸² See par. 67.

¹⁸³ See par. 73-77.

in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.¹⁸⁴

The Appeals Chamber referred to IHRL instruments and case law with respect to the right to be promptly informed of the charges.¹⁸⁵ Similarly, it referred to IHRL instruments and case law with respect to the failure of the Trial Chamber to resolve the writ of *habeas corpus* filed by Barayagwiza in a timely manner.¹⁸⁶

Finally, it concluded:

Based on the foregoing analysis, we conclude that the Appellant was in the constructive custody of the Tribunal from 4 March 1997 until his transfer to the Tribunal's detention unit on 19 November 1997. However, international human rights standards comport with the requirements of Rule 40*bis*. Thus, even if he was not in the constructive custody of the Tribunal, the period of provisional detention was impermissibly lengthy. Pursuant to that Rule, the indictment against the Appellant had to be confirmed within 90 days from 4 March 1997. However, the indictment was not confirmed in this case until 23 October 1997. We find, therefore, that the Appellant's right to be promptly charged pursuant to international standards as reflected in Rule 40*bis* was violated. Moreover, we find that the Appellant's right to an initial appearance, without delay upon his transfer to the Tribunal's detention unit under Rule 62, was violated.¹⁸⁷

And, added:

The crimes for which the Appellant is charged are very serious. However, in this case the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him. This finding is consistent with Rule 40*bis*(H), which requires release if the suspect is not charged within 90 days of the commencement of the provisional detention and Rule 40(D) which requires release if the Prosecutor fails to issue an indictment within 20 days after the transfer of the suspect. Furthermore, this limitation on the period of provisional detention is consistent with international human rights jurisprudence. Finally, this decision is also consistent with national legislation dealing with due process violations that violate the right of the accused to a prompt resolution of his case.¹⁸⁸

¹⁸⁴ See par. 74.

¹⁸⁵ See par. 84, "the Human Rights Committee held in [Glenford Campbell v. Jamaica](#), that detention without the benefit of being informed of the charges for 45 days constituted a violation of Article 9(2) of the ICCPR. Under the jurisprudence of the European Court of Human Rights, intervals of up to 24 hours between the arrest and providing the information as required pursuant to ECHR Article 5(2) have been held to be lawful. However, a delay of ten days between the arrest and informing the suspect of the charges has been held to run afoul of Article 5(2)."; see also par. 81-86.

¹⁸⁶ See par. 87-90.

¹⁸⁷ See par. 100.

¹⁸⁸ See par. 106.

This decision was however reversed on the basis of new facts.¹⁸⁹ Nonetheless, the principles upheld in it, in particular the doctrine of abuse of process, will become a precedent that will subsequently be referred to in Nikolic,¹⁹⁰ Kajelijeli (reduction of sentence),¹⁹¹ Rwamakuba (compensation)¹⁹² and at the ICC in Lubanga.¹⁹³

Effect of IHRL: The Tribunal found that the length of time (96-day) during which the suspect was detained in Cameroon at the behest of the Tribunal violated human rights jurisprudence governing detention of suspects. However, it was cautious in determining that firstly this decision was premised on Rule 40*bis* and not strictly on IHRL. IHRL was used to interpret Rule 40*bis* and give to the latter some significance. Moreover, the Tribunal found that the facts of the case justified the invocation of the abuse of process doctrine. The Statute does not provide for any stay of proceedings, thus the Chamber drew its power to dismiss the indictment and order the immediate release of the defendant from rule 40*bis* interpreted in light of IHRL and general principles of criminal law.

¹⁸⁹ [Prosecutor v. Jean Bosco Barayagwiza](#), Decision, Prosecutor's Request for Review of Reconsideration, ICTR, Appeals Chamber, ICTR-97-19-AR72, 31 March 2000.

¹⁹⁰ [Prosecutor v. Dragan Nikolic](#), Decision on Interlocutory Appeal Concerning Legality of Arrest, ICTY, Appeals Chamber, IT-94-2-AR73, 5 June 2003.

¹⁹¹ [Prosecutor v. Kajelijeli](#), Judgment, ICTR, Appeals Chamber, ICTR-98-44A, 23 May 2005.

¹⁹² [Prosecutor v. Rwamakuba](#), Decision on the Defence Motion concerning the Illegal Arrest and Illegal Detention of the Accused, ICTR, Trial Chamber, ICTR-98-44-T, 12 December 2000.

¹⁹³ [Prosecutor v. Thomas Lubanga Dyilo](#), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC, Appeals Chamber, ICC-01/04-01/06-772 14 December 2006.

The Effects of International Human Rights Law on International Trade Law

International Human Rights Law (IHRL) has effects on International Trade Law (ITL) in the context of the identification of which human rights-based duties and trade related rights compete and how they may be balanced against one another. A diverse list of human rights-based duties in competition with free trade rules has been identified ranging from duties to respect and protect the principle of human dignity, and freedom of expression to duties to fulfill the right to health. These cases show how far trade law takes IHRL into account in the identification and balancing of competing interests. The cases under European Union (EU) law show how IHRL and especially the European Convention of Human Rights (ECHR), together with the European Court of Human Rights (ECtHR) case law, influence the EU's approach to trade law. The first four cases show us that, under EU law, there is a tendency to give lexical priority to IHRL over free trade and free market principles. Some these cases demonstrate that, in some circumstances, IHRL strengthens the free market principles. In World Trade Organization (WTO) law, while the existence of IHRL as a matter of customary international law is recognized, reference to IHRL to define non-economic interests is rare.

1. Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02, ECJ, European Court Reports of Cases 2004 I-09609 (14 October 2004)

Facts: The case concerns restrictions to the free movement of goods and freedom to provide services on grounds of public policy that protects the fundamental values laid down in the German Constitution. Germany had invoked the German constitutional right to human dignity in order to ban Omega from “facilitating or allowing in its [...] establishment games with the object of firing on human targets [...] thereby, ‘playing at killing’ people.”¹⁹⁴

Decision: The Court of Justice (ECJ) ruled that national fundamental rights can be upheld against EU freedoms, on grounds of public policy. Further, the ECJ emphasized:

It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by

¹⁹⁴ [Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn](#), European Court of Justice, C-36/02, [2004] ECR I-09609, par. 5.

international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect.¹⁹⁵

The ECJ concluded:

Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.¹⁹⁶

Effect of IHRL: The principle of human dignity prevailed over the right to free movement of goods and freedom to provide services. The ECJ referred directly to the ECtHR, stressing that the Member States should follow the understanding of the ECtHR of the principle of human dignity and guide their decisions after the ECJ previous case law, when deciding matters involving the principle of human dignity. Thus, IHRL had the effect of *establishing a base-line* for adjudication of restrictions upon free movement of goods and services.

2. Eugen Schmidberger Internationale Transporte Planzuge v. Republik Österreich, Case C-112/00, ECJ, European Court Reports 2003 I-05659 (12 June 2003)

Facts: The case concerns a restriction on free movement of goods caused by an environmental group's demonstration (an exercise of the rights of freedom of expression and freedom of assembly) which closed a major trans-European route for 30 hours. The international transport enterprise, Schmidberger, invoked IHRL by saying that:

Since [the restriction of movement of goods] could not be justified by the protesters' right to freedom of expression and freedom of assembly the restriction was a breach of Community law in respect of which the Member State concerned incurred liability.¹⁹⁷

On the other hand, the Republic of Austria replied that:

¹⁹⁵ See par. 33. The ECJ did not refer to the jurisprudence of the ECtHR by mentioning a specific case, but it referred to other ECJ cases that are directly referring to ECtHR jurisprudence: [Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas](#), European Court of Justice, C-260/89, [1991] ECR I-2925, par. 41; [Connolly v. Commission](#), European Court of Justice, C-274/99, [2001] ECR I-1611, par. 37; [Roquette Frères](#), European Court of Justice, C-94/00, [2002] ECR I-9011, par. 25; [Eugen Schmidberger Internationale Transporte Planzuge v. Republik Österreich](#), European Court of Justice, Case C-112/00, [2003] I-05659, par. 71.

¹⁹⁶ See par. 42.

¹⁹⁷ [Eugen Schmidberger Internationale Transporte Planzuge v. Republik Österreich](#), European Court of Justice, Case C-112/00, [2003] ECR I-05659, 12 June 2003, par. 16.

the claim should be rejected on the grounds that the decision not to ban the demonstration was taken following a detailed examination of the facts, that information as to the date of the closure of the Brenner motorway had been announced in advance in Austria, Germany and Italy, and that the demonstration did not result in substantial traffic jams or other incidents. The restriction on free movement arising from a demonstration is permitted provided that the obstacle it creates is neither permanent nor serious. Assessment of the interests involved should lean in favour of the freedoms of expression and assembly, since fundamental rights are inviolable in a democratic society.¹⁹⁸

Decision: The ECJ did not accept Schmidberger's argument. The ECJ assessed the proportionality between the enjoyment of human rights displayed by the environmental protest, and the impact on the free movement of goods. The ECJ also examined the proportionality of the exercise of the free movement of goods and its impact on freedom of assembly. The ECJ ruled that the restriction on free movement of goods had to be justified by Austria despite the wide margin of appreciation given to the States, observing that,

It is apparent from the file in the main case that the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution.¹⁹⁹

The ECJ elaborate on the relationship between free movement of goods and fundamental human rights:

[...] For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect.²⁰⁰

The Court upheld the Austrian authorities' decision to respect the fundamental rights guaranteed both by the ECHR and Austrian Constitution when deciding to allow the restriction.²⁰¹ In addition, the ECJ held:

whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those

¹⁹⁸ See par. 17.

¹⁹⁹ See par. 69.

²⁰⁰ See par. 71.

²⁰¹ See par. 76. In the present decision, the ECJ referred to [Vereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH v. Heinrich Bauer Verlag](#), European Court of Justice, C-368/95, [1997] ECR I-03689, par. 26, [Mary Carpenter v. Secretary of State for the Home Department](#), European Court of Justice, C-60/00, [2002] ECR I-6279, par. 42, and [Steel and Others v. The United Kingdom](#), European Court of Human Rights, App. No. 24838/94, 23 September 1998, par. 101.

provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.²⁰²

The ECJ further argued:

Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.²⁰³

Effect of IHRL: The ECJ referred to the ECHR and the ECtHR's case law when establishing the relationship between the fundamental human rights at issue and freedom of movement of goods. IHRL had the effect of *identifying the balance between rights and competing interests, offering rights a lexical priority in the balancing exercise*.

3. Vereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH v. Heinrich Bauer Verlag, Case C-368/95, ECJ, European Court Reports 1997 I-03689 (26 June 1997)

Facts: The case concerns a ban Austria implemented on games and quizzes in periodicals (newspapers and magazines) on the basis of which it prohibited the sale of periodicals containing prize competitions. An Austrian newspaper, referring to the Austrian Law on Unfair Competition, filed a case against a German newspaper, asking for the latter to cease to sell its newspapers in Austria as the German newspaper was offering Austrian readers the possibility to enter in prize competitions. It is neither clear from the ECJ decision which party invoked IHRL nor whether they raised any questions related to the right to freedom of expression.

Decision: The ECJ ruled that:

Where a Member State relies on overriding requirements, such as maintaining press diversity, under Article 30 of the Treaty in order to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be

²⁰² See par. 79.

²⁰³ See par. 80. The ECJ mentioned [Commission v. Germany](#), 62/90, [1992] ECR I-2575, par. 23, and [X v. Commission](#), C-404/92 P, [1994] ECR I-4737, par.18.

interpreted in the light of the general principles of law and in particular of fundamental rights.²⁰⁴

Further, the ECJ declared that:

Those rights include freedom of expression, as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.²⁰⁵

It added:

A prohibition on selling publications which offer the chance to take part in prize competitions may, in that context, detract from freedom of expression. Article 10 does, however, permit derogations from that freedom for the purposes of maintaining press diversity, in so far as they are prescribed by law and necessary in a democratic society.²⁰⁶

The ECJ held that while deciding on Article 31 of the European Community Treaty, the Member States need to demonstrate whether the prohibition is proportionate and whether the aim of the prohibition cannot be achieved by less restrictive means.²⁰⁷

Effect of IHRL: The ECJ's ruling indicated that the right to freedom of expression strengthens the exercise of free movement of goods. IHRL had the effect of *identifying the balance between rights and competing interests, offering rights a lexical priority in the balancing exercise*. Therefore, IHRL had a significant effect in reaching the finding of the present decision that concerned balancing of the interests in free movement of goods, market competition, press diversity and freedom of expression.

4. European Communities – Measures affecting asbestos and asbestos-containing products, WTO, Report on the Appellate Body (WT/DS135/AB/R) (12 March 2001)

Facts: In this case Canada claimed an inconsistency in French regulations banning the importations of asbestos-containing products on public health and safety grounds.

²⁰⁴ [Vereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH v. Heinrich Bauer Verlag](#), European Court of Justice, C-368/95, [1997] ECR I-03689, 26 June 1997, par. 24. The ECJ referred to [Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas](#), European Court of Justice, C-260/89, [1991] ECR I-2925, par. 43.

²⁰⁵ See par. 25, The ECJ again referred to [Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas](#), European Court of Justice, C-260/89, [1991] ECR I-2925, par. 44.

²⁰⁶ See par. 26. The ECJ recalled the judgment [Informationsverein Lentia and Others v. Austria](#), European Court of Human Rights, App. Nos. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, 24 November 1993.

²⁰⁷ See par. 34.

Decision: In deciding whether the French ban was necessary to protect the public health, the Appellate Body discussed GATT, Article XX (b) ('necessary to protect human, animal and plant life or health'). The Appellate Body held that:

...it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.²⁰⁸

The Appellate Body argued that:

[...] the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.²⁰⁹

The Appellate Body ruled that the 'control use' measure proposed by Canada would not allow France to achieve its chosen level of protection of health.²¹⁰

Effect of IHRL: The Appellate Body gave the State a broad discretion when deciding the measures to take to protect the life or health of its citizens. The right to life and the right to health had been identified as legitimate non-economic restrictions to free trade. The *effect of IHRL has been recognition of rights as legitimate matters in balancing free trade and non-economic restrictions*. However, it has to be mentioned that in the present case, the right to health is not characterized as a right to the highest attainable standard of health as in IHRL, but as a public health concern.

5. Thailand – Restrictions on importation of and internal taxes on cigarettes, WTO, Report of the Panel (WT/DS10/R – 37S/200) (7 November 1990)

Facts: The case concerns a restriction on the import of foreign cigarettes into Thailand. Thailand claimed that:

the prohibition on imports of cigarettes was justified by the objective of public health policy which it was pursuing, namely to reduce the consumption of tobacco which was harmful to health. It was therefore covered by Article XX (b). The production and consumption of tobacco undermined the objectives set out in the Preamble of the General

²⁰⁸ [European Communities – Measures affecting asbestos and asbestos-containing products](#), WTO, Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001, par. 168.

²⁰⁹ See par. 172.

²¹⁰ See par. 174-5.

Agreement which were: to raise the standard of living, ensure full employment and a large and steadily growing volume of real income and effective demand, develop the full use of the resources of the world and expand the production and exchange of goods. Instead, smoking lowered the standard of living, increased sickness and thereby led to billions of dollars being spent every year on medical costs, which reduced real income and prevented an efficient use being made of resources, human and natural.²¹¹

Thailand did not mention that the right to health is a human right and it did not make reference to IHRL and neither United States refer to IHRL.

Decision: In its decision, the dispute settlement Panel noted that “[Article XX(b)] clearly allowed contracting parties to give priority to human health over trade liberalization”²¹² as long as the measure taken to promote such an aim was necessary. The Panel held that a ban on cigarette advertising was, in general, warranted on public health grounds and could be justified under Article XX (b) of Thailand's Protocol of Accession.²¹³ Yet, the Panel found that Thailand's measure to ban the import of cigarettes, but not regulate the domestic production, was an inconsistency with Article XI:1 of the General Agreement and not justified by Article XX(b).²¹⁴ In reaching the findings the Appellate Body did not invoke IHRL.

Effect of IHRL: Thanks to the language within the treaty, health may prevail over trade liberalization *in a balancing exercise*. As in European Communities – Measures affecting asbestos and asbestos-containing products, the parties and the Appellate Body discussed the right to health not as a human right, but rather as a public health matter.

6. Brazil – Measures Affecting Imports of Re-treaded Tyres, WTO, Appellate Body Report (WT/DS332/AB/R) (3 December 2007)

Facts: The case concerns Brazil's ban on the import of re-treaded tyres, but not on domestic ones. The European Communities challenged the ban as a violation of WTO rules, whereas Brazil justified the import ban under Article XX (b) of the GATT (general exceptions – necessary to protect human life or health). Neither Brazil nor the European Communities invoked the right to health under IHRL, namely as a right to the highest attainable standard of health.

Decision: The Appellate Body found that, although the ban was necessary to protect health and the environment, Brazil's import restrictions were inconsistent with WTO rules because it

²¹¹ [Thailand – Restrictions on importation of and internal taxes on cigarettes](#), WTO, Report of the Panel, WT/DS10/R – 37S/200, 7 November 1990, par. 21.

²¹² See par. 73.

²¹³ See par. 73-4.

²¹⁴ See par. 81.

discriminated between MERCOSUR countries and other WTO Members. The Appellate Body noted:

the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal. The tribunal found against Brazil because the restriction on imports of remoulded tyres was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.²¹⁵

The Appellate Body found that:

The MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination. Furthermore, we *reverse* the Panel's finding, in paragraph 7.287 of the Panel Report, that, under the chapeau of Article XX of the GATT 1994, discrimination would be unjustifiable only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined". We therefore *reverse* the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination. We also *reverse* the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that, to the extent that the MERCOSUR exemption is not the result of "capricious" or "random" action, the Import Ban is not applied in a manner that would constitute arbitrary discrimination.²¹⁶

Nonetheless, the Appellate Body argued that Brazil's ban on import could have been justified if it would have imposed the same ban at domestic level.

Effect of IHRL: While previous WTO decisions have not gone this far in safeguarding environmental values, the present decision reveals the Appellate Body's standing on trade restrictions that advance the protection of human health and environmental objectives. As the Appellate Body held, if the measures would not have been discriminatory, the right to health could have prevailed over the prohibition to ban import in a *balancing exercise*. Like in European Communities – Measures affecting asbestos and asbestos-containing products and Thailand – Restrictions on importation of and internal taxes on cigarettes, the Appellate Body did not discuss the right to health as a human right.

²¹⁵ [Brazil – Measures Affecting Imports of Re-treaded Tyres](#), WTO, Appellate Body Report, WT/DS332/AB/R, 3 December 2007, par. 228.

²¹⁶ See par. 233.

7. United States – Standards for Reformulated and Conventional Gasoline, WTO, Appellate Body Report (WT/DS2/AB/R) (20 May 1996)

Facts: The case concerns a set of rules aiming to regulate the consumption of gasoline and reduce the emission effects to prevent air pollution. However, the US had different methods to regulate the domestic and imported gasoline. Neither the United States nor Venezuela referred to IHRL.

Decision: The Appellate Body ruled on GATT, Article XX (b) ('necessary to protect human, animal and plant life or health') where the wording of the WTO treaty was briefly discussed.

The Appellate Body ruled that:

The "general rule of interpretation" set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement").²¹⁷

Further, the Appellate Body held that WTO law "is not to be read in clinical isolation from public international law."²¹⁸

Moreover, the Appellate Body referred to ECtHR's Golder v. United Kingdom case and Inter-American Court of Human Rights international law reports on Restrictions to the Death Penalty Cases²¹⁹ to highlight that Article 31 of the Vienna Convention on the Law of the Treaties (VCLT) has attained the status of international law and therefore, is part of the customary rules of interpretation of public international law.²²⁰

Effect of IHRL: As IHRL norms are part of public international law with some having reached the status of customary international law, this case signifies that WTO agreement must be interpreted in accordance with these norms. Article 31 VCLT, in this case, opened the possibility for WTO law to be interpreted according to customary rules of interpretation of public international law. In addition, the Panel referred to IHRL jurisprudence to support its claim that a

²¹⁷ [United States – Standards for Reformulated and Conventional Gasoline](#), WTO, Appellate Body Report, WT/DS2/AB/R, 20 May 1996, ARTICLE 31 General rule of interpretation 1, page 17.

²¹⁸ See WTO Appellate Body Report, ARTICLE 31 General rule of interpretation 1, page 17.

²¹⁹ Restrictions to the Death Penalty Cases, (1986) 70 International Law Reports 449 from the Inter-American Court of Human Rights.

²²⁰ The WTO Appellate Body additionally referred to the Territorial Dispute Case, [Libyan Arab Jamahiriya v. Chad](#), (1994), I.C.J. Reports, p. 6.

branch of international law cannot be read in isolation from general international law. This judicial borrowing resulted in an opening of ITL towards general international law.

8. European Communities - Measures concerning meat and meat products, WTO, Appellate Body Report (WT/DS26/AB/R, WT/DS48/AB/R) (13 February 1998)

Facts: The United States claimed that the measures taken by the European Communities (EC) under the Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action restricts or prohibits imports of meat and meat products from the United States, and, thus, are inconsistent with Articles III or XI of the GATT 1994, Articles 2, 3 and 5 of the SPS Agreement, Article 2 of the TBT Agreement and Article 4 of the Agreement on Agriculture.²²¹ While considering the panel selection for the present dispute, the EC claimed that the panel was not ‘independent and impartial’ and referred to a judgment of the ECtHR, which found that a person was denied a fair trial because the expert appointed by the relevant tribunal had drafted the report triggering the trial against that person.²²² In its defence, the US argued that by objecting the expert selection process and EC’s appeal, the EC:

provides no support for the claims regarding due process rights, arguing that the European Communities cited nothing more "than the most general statement" by the Appellate Body in Thailand – H-Beams and a judgment of the European Court of Human Rights.²²³

Decision: The Appellate Body held that, in its selection and use of experts, the Panel did not act inconsistently with WTO law (Articles 11, 13.2 and Appendix 4 of the DSU and Article 11.2 of the SPS agreement).²²⁴

While the panels considered whether the “precautionary principle” was customary international law that could justify the EC’s failure to meet the scientific evidence standards of the WTO’s food safety rules, the Appellate Body was hesitant to address this claim and did not elaborate on the WTO interpretation of customary international law. However, the Panel held:

merely characterizing a treaty provision as an ‘exception’ does not by itself justify a ‘stricter’ or ‘narrower’ interpretation of that provision than would be warranted by an examination of the ordinary meaning of the actual treaty words, viewed in context and in

²²¹ [European Communities - Measures concerning meat and meat products](#), WTO, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, 13 February 1998.

²²² [Bönisch v. Austria](#), European Court of Human Rights, App. No. 8658/79, 6 May 1985.

²²³ See par. 121.

²²⁴ See par. 149.

the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.²²⁵

Effect of IHRL: The WTO Appellate Body made no reference to the IHRL instruments or ECtHR case law while considering the EC claim on selection of the Panel. However, it is worth noting that the parties to the dispute, while claiming their rights, referred to IHRL case law and brought IHRL jurisprudence before the WTO panel. Moreover, the Panel argued that for the interpretation of the WTO treaties, the WTO Appellate Body should not apply WTO law narrowly but to use an interpretative technique that gives greater scope to the general exception clauses.

9. European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, Panel and Appellate Body Reports (WT/DS400/AB/R, WT/DS401/AB/R) (18 June 2014)

Facts: This case concerns the EU regulations prohibiting the importation and selling of seal products. The EU regulations have some exceptions applicable to seal products derived from hunts conducted by Inuit or indigenous communities and hunts conducted for marine resource management purposes. In their claim the appellee made reference to IHRL instruments:

The European Union points out that the protection of the economic and social interests of Inuit or indigenous communities is recognised at the international level as illustrated, for example, in the United Nations Declaration on the Rights of Indigenous Peoples (UN

²²⁵ See par. 104.

Declaration) and in the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention).²²⁶

Decision: In the dispute settlement, the WTO Appellate Body did not refer to indigenous rights. The WTO Body noted that:

[Article 3 of Regulation (EC) No 1007/2009] starts with a paragraph prescribing that the placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities [...] and contribute to their subsistence.²²⁷

The WTO Appellate Body addressed the claims of Canada and Norway that relate to the Panel's analysis of whether the EU Seal Regime is necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994. First, it argued that the reason behind the adoption of the EU Seal Regime was to:

articulate concerns regarding seal welfare, rather than concerns regarding the protection of indigenous communities.²²⁸

²²⁶ [European Communities – Measures Prohibiting the Importation and Marketing of Seal Products](#), Panel and Appellate Body Reports, WT/DS400/AB/R, WT/DS401/AB/R, 18 June 2014. The Panel detailed in the footnotes of the report: “The UN Declaration is a Resolution of the UN General Assembly (General Assembly Resolution A/RES/61/295 of 13 September 2007) affirming indigenous peoples' right to self-determination (Articles 3 and 4) and “to maintain and strengthen their distinct political, legal, economic, social and cultural institutions” (Article 5). States are called on to “provide effective mechanisms for prevention of, and redress for ... [a]ny action which has the aim or effect of dispossessing them of their ... resources” (Article 8(2)(b)). In this vein, further recognition of various social and economic interests, including the preservation of cultural heritage and control over resources, is reiterated throughout the UN Declaration. See e.g. Article 20(1) (“Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities”.); Article 26(2) (“Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired”.); Article 29(1) (“Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources”.); Article 32 (“Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources”.)” and about the ILO declaration “The ILO Convention (Convention No. 169 of 27 June 1989) similarly exhorts governments to account for and protect the interests of indigenous peoples through inter alia “promoting the full realisation of the social, economic and cultural rights of these peoples with respect to their social and cultural identity” (Article 2(2)(b)). The ILO Convention recognizes that “the integrity of the values, practices and institutions of [indigenous] peoples shall be respected” (Article 5(b)). Most relevantly, the ILO Convention states that the “rights of [indigenous peoples] to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources”(Article 15(1)). We note that the definition of “other indigenous communities” in the Implementing Regulation mirrors in identical language provisions from the ILO Convention on its scope of application. See Article 1(b) of the ILO Convention and Article 2(1) of the Implementing Regulation.” Footnotes 468 and 479.

²²⁷ See the Appellate Body Report, par. 4.6.

²²⁸ See par. 5.157.

The WTO Appellate Body considered that:

While the EU public had moral concerns regarding seal welfare in general, the Panel did not consider that the evidence before it supported the European Union's position that "the EU public attributes a higher moral value to the protection of Inuit interests as compared to seal welfare".²²⁹

The Panel decided that the Commission Proposal:

provide[d] evidence that the public concerns about seal welfare constitute a moral issue for EU citizens [...].²³⁰

For the Panel, the EU Seal Regime pursued EU public moral concerns regarding seal welfare while at the same time accommodating other interests so as to mitigate the impact of the measure on indigenous communities.²³¹ Further, the WTO Appellate Body analyzed whether the EU Seal Regime is justified under the Article XX(a) and recalled the definition of 'public morals' as developed by the panel in US – Gambling, according to which:

the term 'public morals' denotes 'standards of right and wrong conduct maintained by or on behalf of a community or nation'.²³²

The Appellate Body upheld the panel's findings that:

the EU Seal Regime is provisionally deemed necessary within the meaning of Article XX(a) of the GATT 1994.²³³

Effect of IHRL: The WTO Appellate Body did not elaborate on indigenous peoples' rights. However, it is worth noting that IHRL instruments, such as United Nations Declaration on the Rights of Indigenous Peoples and the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries were cited during the proceedings. Further, following this decision, incorporating the human rights' interpretation of "public morals" found into certain trade agreements started to have a strong support from scholars and international organizations (such as OHCHR).²³⁴ The "public morals" exception can facilitate a way through for human rights to influence the interpretation of WTO law.

²²⁹ See par. 5.148.

²³⁰ See par. 5. 154.

²³¹ See par. 5. 161.

²³² See par. 5. 199. The Appellate Body referred to [United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services](#), Appellate Body Report, WT/DS285/AB/R, 20 April 2005, par. 125.

²³³ See par. 5. 290.

²³⁴ See generally, Mark Wu, Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine, 33 YALE J. INT'L L. (2008); Robert Howse, Social and Labor Issues and the Agendas of the IMF, World Bank, WTO and OECD, 93 AM. Soc'y INT'L L. PROC. 143, 148 (2000); Robert Howse, The World Trade Organization and the Protection of Workers' Rights, 3 J. SMALL & EMERGING Bus. L. 131 (1999); Liane M. Jarvis, Note, Women's Rights and the Public Morals Exception of GATT Article 20, 22 MICH. J. INT'L L. 219 (2000); Carlos Lopez Hurtado, Note, Social Labelling and WTO Law, 5 J. INT'L ECON. L. 719 (2002) and WTO Public Forum 2011, Session 37 – Human Rights and the WTO: Dispute Settlement and Trade Policy Review

10. China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products, WTO, Report of the Appellate Body (WT/DS363/AB/R) (21 December 2009)

Facts: This is a case about a series of Chinese measures regulating activities concerning the importation and distribution of certain publications and audiovisual entertainment products. China claimed:

that certain provisions found to be inconsistent with its trading rights commitments are nevertheless justified under Article XX(a) of the GATT 1994 because they form part of measures governing China's regime to review the content of the relevant products, thereby protecting public morals in China.²³⁵

While referring to 'public morals' neither China nor US invoked IHRL.

Decision: In this case the panel recalled that:

[...] the content and scope of the concept of "public morals" can vary from Member to Member, as they are influenced by each Members' prevailing social, cultural, ethical and religious values.²³⁶

And, affirmed that:

it is undoubtedly the case that the protection of public morals ranks among the most important values or interests pursued by Members as a matter of public policy. [...] We therefore concur that the protection of public morals is a highly important value or interest.²³⁷

The panel held that there was no explicit link between the measure China imposed and the protection of public morals.²³⁸ The panel concluded that China's restriction of the right to import relevant products was not "necessary to protect public morals" because there were other alternatives that could not have been reasonably available to China to "protect public morals".²³⁹

Mechanisms; OHCHR, Human Rights and World Trade Agreements, Using general exception clauses to protect human rights (2005), available at <http://www.ohchr.org/Documents/Publications/WTOen.pdf>.

²³⁵ China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products, WTO, Report of the Appellate Body, WT/DS363/AB/R, 21 December 2009, par. 7.

²³⁶ See the Report of the Panel, par. 7. 763.

²³⁷ See par. 7. 817.

²³⁸ See par. 7.780.

²³⁹ See par. 7.886 and par. 7.908.

Therefore, China's measure was inconsistent within the meaning of Article XX(a).²⁴⁰ The Appellate Body upheld the panel's decision and affirmed that China has not demonstrated that the relevant provisions are "necessary" to protect public morals, within the meaning of Article XX(a) of the GATT 1994 and that, as a result, China has not established that these provisions are justified under Article XX(a).²⁴¹

Effect of IHRL: The effect of IHRL on the ITL did not appear in the discussion. Yet, this is the first dispute in which the panel ruled on the meaning of 'public morality' in the GATT. The panel also elaborated on its position towards a claim involving "public morals". It is worth mentioning that behind the "public morals" argument a State might invoke individual human rights violations. However, while interpreting the 'public morals' concept, the WTO Appellate Body or the panel never referred to HRC or ECtHR – though these human rights bodies have extensively interpreted the concept of 'public morals'.

²⁴⁰ See par. 7.911.

²⁴¹ See the Report of the Appellate Body, par. 415.

The Effects of International Human Rights Law on International Environmental Law

This case list contains cases on the effects of International Human Rights Law (IHRL) on International Environmental Law (IEL). Due to the lack of international environmental courts, most of the cases demonstrate how human rights courts have interpreted the right to life, the right to respect for private life, freedom of expression, and the right to property as confirming substantive and procedural obligations under IHRL in matters relating to the environment. These include, among others, the obligation to inform the individuals about environmental effects and risks, the obligation to take precautionary measures to eliminate any environmental damage and the obligation to facilitate participation of indigenous communities in the decision making processes about their ancestral lands. In these cases IHRL both echoes and complement procedural obligations in IEL and provides for a forum of litigating IEL through rights-based individual petitions. In cases before non-human rights courts, IHRL is employed as a source for the substantive development of IEL, for example by grounding the human right to development, and inter-generational equity principle.

1. Claude Reyes et al. v. Chile, Inter-American Court of Human Rights (19 September 2009)

Facts: The Foreign Investment Committee of Chile approved a foreign investment, which involved the design, construction and operation of a forestry exploitation project. On May 7, 1998, Marcel Claude Reyes as the director and Arturo Longton Guerrero as a deputy, requested the Foreign Investment Committee to provide information deemed of public interest. One of those organizations, Terram Foundation aimed “to participate actively in public debates and in the production of sound, scientific information to support the social and civic efforts of the people of Chile in favor of sustainable development.” The Committee refused to provide whole information. They applied to the Supreme Court of Chile but their application was declared manifestly ill-founded therefore inadmissible. Before the Inter-American Court of Human Rights (IACtHR), they alleged that their right of access to public information was violated. Chile argued that disclosing the information was against the public interest and the country’s development.

Decision: The IACtHR firstly set out the scope of Article 13 of the Convention:

In relation to the facts of the instant case, the Court finds that, by expressly stipulating the right to “seek” and “receive” “information,” Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions

permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.²⁴²

In order to show the global consensus on the right of access to information, the IACtHR referred to relevant international instruments including Rio Declaration on Environment and Development and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).²⁴³

According to the IACtHR, in the present case, the refusal of the request of information was not based on law nor was it necessary in a democratic society.²⁴⁴ As the Court stated,

...the establishment of restrictions to the right of access to State-held information by the practice of its authorities, without respecting the provisions of the Convention creates fertile ground for discretionary and arbitrary conduct by the State in classifying information as secret, reserved or confidential, and gives rise to legal uncertainty concerning the exercise of this right and the State's powers to limit it.²⁴⁵

The Court also noted that:

the possibility of Messrs. Claude Reyes and Longton Guerrero carrying out social control of public administration was harmed by not receiving the requested information, or an answer justifying the restrictions to their right of access to State-held information.²⁴⁶

Effect of IHRL: The IACtHR provided *a forum for litigating the right* to environmental information through the right to freedom of expression. The interpretation of freedom of expression as covering the right to access to State-held information *enabled the Court to address the importance of public information on environmental matters*. It is also worth noting that the State's argument to justify its failure on the basis of the development of the country was not deemed compatible with the Convention.

²⁴² [Claude Reyes et al. v. Chile](#), Inter-American Court of Human Rights, Series C No. 151, Merits, Reparations and Cost, 19 September 2009, par. 77.

²⁴³ See par. 81.

²⁴⁴ See par. 94-95.

²⁴⁵ See par. 98 (original references omitted).

²⁴⁶ See par. 99.

2. Taşkın and Others v. Turkey, European Court of Human Rights, App. No. 46117/99 (10 November 2004)

Facts: The applicants were living in Ovacık and the surrounding villages, where Turkish Ministry of Environment granted permits to operate a gold mine. Although there had been several judicial decisions annulling the permits, the administrative authorities did not comply with these decisions. Despite the existing judicial decisions, the Council of Ministers issued a non-public decision of principle allowing the operation of the gold mine. The applicants alleged that they had suffered from the environmental effects of Ovacık gold mine, which included movement of people and noise pollution.

Decision: The European Court of Human Rights (ECtHR) began with introducing international and regional legal instruments on the right to environment establishing the right of the citizens to access to information and to participate in the decision making.²⁴⁷ Then it focused on the procedural aspect of the right to respect for private life (Art. 8, European Convention on Human Rights (ECHR)). According to the Court:

Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake. The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question. Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.²⁴⁸

In the present case, the Court decided that these procedural guarantees were undermined by the Turkish authorities:

The circumstances of the case clearly demonstrate that, notwithstanding the procedural guarantees afforded by Turkish legislation and the implementation of those guarantees by judicial decisions, the Council of Ministers, by a decision of 29 March 2002 which was not made public, authorised the continuation of production at the gold mine, which had

²⁴⁷ [Taşkın and Others v. Turkey](#), European Court of Human Rights, App. No. 46117/99, 10 November 2004, par. 98-100. The Court cited the [Rio Declaration on Environment and Development](#), [Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters](#), and the [Parliamentary Assembly of the Council of Europe's Recommendation 1614 \(2003\) on environment and human rights](#).

²⁴⁸ See par. 119 (original references omitted).

already begun to operate in April 2001. In so doing, the authorities deprived the procedural guarantees available to the applicants of any useful effect.²⁴⁹

Therefore it found that Article 8 was violated.

Effect of IHRL: This case demonstrates how the right to respect for private life has been *interpreted as including positive obligations* that internalize the precautionary principle in IEL and participatory rights for affected persons in matters relating to the environment. Based on Article 8, the Court presented a positive obligation “to predict and assess potential adverse effects to the environment.” It also regarded the participation of the affected individuals as an essential part of the procedural safeguards.

3. Dubetska and Others v. Ukraine, European Court of Human Rights, App. No. 30499/03 (10 February 2011)

Facts: The applicants before the ECtHR were two Ukrainian families who had their residences in close proximity to a coal mine and a coal processing factory in Ukraine as well as two spoil heaps created by these industrial facilities. They claimed that their right to respect for private and family life (Art. 8 ECHR) was violated on account of prolonged environmental pollution emanating from a State-owned mine and factory.

Decision: The ECtHR began with establishing the relationship between Article 8 and the right to environment:

Article 8 nor any other provision of the Convention guarantees the right to preservation of the natural environment as such. Likewise, no issue will arise if the detriment complained of is negligible in comparison to the environmental hazards inherent in life in every modern city. However, an arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in significant impairment of the applicant's ability to enjoy his home, private or family life. The assessment of that minimum level is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life.²⁵⁰

The Court abstained from taking a generally applicable standing towards environmental pollution and its effects:

While there is no doubt that industrial pollution may negatively affect public health in general and worsen the quality of an individual's life, it is often impossible to quantify its effects in each individual case. As regards health impairment for instance, it is hard to distinguish the effect of environmental hazards from the influence of other relevant

²⁴⁹ See par. 125.

²⁵⁰ [Dubetska and Others v. Ukraine](#), European Court of Human Rights, App. No. 30499/03, 10 February 2011, par. 105 (original references omitted).

factors, such as age, profession or personal lifestyle. “Quality of life” in its turn is a subjective characteristic which hardly lends itself to a precise definition.²⁵¹

According to the Court, the responsibility of the State must be evaluated on the basis of the following questions:

...whether a situation was a result of a sudden and unexpected turn of events or, on the contrary, was long-standing and well known to the State authorities; whether the State was or should have been aware that the hazard or the nuisance was affecting the applicant's private life and to what extent the applicant contributed to creating this situation for himself and was in a position to remedy it without a prohibitive outlay.²⁵²

With regard to the present case, the Court found that, the applicants lived permanently in the area that was legally classified as unsafe for residential use.²⁵³ Accordingly, this reached the level of severity necessary to bring a complaint under Article 8.²⁵⁴

On the question of whether Ukraine struck a fair balance between the interests of the individuals concerned and the society as a whole, the Court granted a margin of appreciation to the States in finding appropriate means:

In cases involving environmental issues, the State must be allowed a wide margin of appreciation and be left a choice between different ways and means of meeting its obligations. The ultimate question before the Court is, however, whether a State has succeeded in striking a fair balance between the competing interests of the individuals affected and the community as a whole. In making such an assessment all the factors, including domestic legality, must be analysed in the context of a particular case.²⁵⁵

The Court emphasized its subsidiary role in complex issues as in the present case. It limited itself to examine whether the decision-making was fair and stated that, “only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities.”²⁵⁶ According to the Court, fairness of the process must be determined on the basis of the following factors:

...whether the authorities conducted sufficient studies to evaluate the risks of a potentially hazardous activity, whether, on the basis of the information available, they have developed an adequate policy *vis-à-vis* polluters and whether all necessary measures have been taken to enforce this policy in good time. The Court will likewise examine to what extent the individuals affected by the policy at issue were able to contribute to the decision-making, including access to the relevant information and ability to challenge the authorities' decisions in an effective way.²⁵⁷

²⁵¹ See par. 106 (original references omitted).

²⁵² See par. 108 (original references omitted).

²⁵³ See par. 118.

²⁵⁴ See par. 119.

²⁵⁵ See par. 141 (original references omitted).

²⁵⁶ See par. 142.

²⁵⁷ See par. 143 (original references omitted).

The Court concluded that Ukraine failed to relocate the applicants or put in place a functioning policy dealing with environmental risks. Its actions could therefore not be justified under Art. 8(2) of the Convention.²⁵⁸

Effect of IHRL: In this case, the Court *incorporated environmental risks into the balancing exercise between rights and public interests*. Even though the Court abstained from reading Article 8 as granting a free standing right to environment, it derived positive obligations of the State to protect individuals from industrial pollution from the same article. It also recalled the procedural guarantees in environmental issues, previously set forth in *Taşkın* case.

4. Öneryildiz v. Turkey, European Court of Human Rights, App. No. 48939/99 (30 November 2004)

Facts: The applicants alleged that the Turkish authorities were responsible for the deaths of their close relatives and for the destruction of their property as a result of a methane explosion on 28 April 1993 at the municipal rubbish tip in Ümraniye (Istanbul). They relied on Articles 2 (right to life), 8 (right to private life), and 13 (right to effective remedy).

Decision: The ECtHR referred to several Council of Europe instruments on environmental law to show that governments are obliged to provide technical and financial assistance to the local authorities in their treatment of household waste.²⁵⁹ Any damage to the environment and human life must be established as criminal offences.²⁶⁰ With regard to such dangerous activities,

public access to clear and full information is viewed as a basic human right.²⁶¹

The Court explained the positive obligations of the State in dangerous activities as follows:

This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential

²⁵⁸ See par. 154-156.

²⁵⁹ Öneryildiz v. Turkey, European Court of Human Rights, App. No. 48939/99, 30 November 2004, par. 59 referring to [Parliamentary Assembly, Resolution 587 \(1975\) on problems connected with the disposal of urban and industrial waste](#), [Resolution 1087 \(1996\) on the consequences of the Chernobyl disaster](#), [Recommendation 1225 \(1993\) on the management, treatment, recycling and marketing of waste](#), the [Committee of Ministers, Recommendation no. R \(96\) 12 on the distribution of powers and responsibilities between central authorities and local and regional authorities with regard to the environment](#), [Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment](#) (ETS no. 150 – Lugano, 21 June 1993) and the [Convention on the Protection of the Environment through Criminal Law](#) (ETS no. 172 – Strasbourg, 4 November 1998).

²⁶⁰ See par. 61 citing the Council of the European Union's [Framework Decision no.2003/80 of 27 January 2003](#) and the European Commission's [proposal of 13 March 2001, amended on 30 September 2002, for a directive on the protection of the environment through criminal law](#).

²⁶¹ See par. 62.

risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.²⁶²

Then, the Court emphasized the public's right to information among these preventive measures and established that this right can also be derived from Article 2 ECHR.²⁶³ It further stated that the obligations derived from Article 2 also covered the obligation to "set up an effective judicial system" which,

does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims.²⁶⁴

With regard to the present case, according to the Court,

it was impossible for the administrative and municipal departments responsible for supervising and managing the tip not to have known of the risks inherent in methanogenesis or of the necessary preventive measures, particularly as there were specific regulations on the matter.²⁶⁵

Despite wide margin of appreciation given to the States in dealing with social, economic and urban problems, the Court did not see the arguments of the Turkish authorities convincing, and decided that preventive measures might reasonably be regarded as suitable means to avert the risk.²⁶⁶

The Court further observed that the Turkish authorities failed

to provide the inhabitants of the Ümraniye slums with information enabling them to assess the risks they might run as a result of the choices they had made.²⁶⁷

In light of these findings, the Court found a violation of Article 2 of the Convention.

Effect of IHRL: The Court's interpretation of the right to life had the effect of *creating positive obligations*, i.e. taking preventive operational measures to protect the individuals from hazardous activities and informing the affected individuals about the risks of those activities.

²⁶² See par. 90.

²⁶³ See par. 90.

²⁶⁴ See par. 92.

²⁶⁵ See par. 101.

²⁶⁶ See par. 107.

²⁶⁷ See par. 108.

5. The Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, African Commission on Human and Peoples' Rights (27 October 2001)

Facts: The applicants alleged that the military government of Nigeria had condoned and facilitated operations of oil companies in Ogoniland, which resulted in contamination of water, soil and air, and caused environmental degradation and health problems among Ogoni people. They alleged violations of Articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter.

Decision: For the first time, the right of peoples to dispose freely of their own natural resources have been established. According to the African Commission,

...despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.²⁶⁸

Besides the right of peoples to dispose freely their own natural resources (Article 21), the right to health and clean environment, right to adequate housing, and right to food of Ogoni people were also violated.²⁶⁹ On the relationship between human rights and environmental rights in African context, the Commission highlighted:

The uniqueness of the African situation and the special qualities of the African Charter imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.

The Commission concluded that

the intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities.²⁷⁰

²⁶⁸ [The Social and Economic Rights Action Centre \(SERAC\) and Center for Economic and Social Rights \(CESR\) v Nigeria](#), African Commission on Human and Peoples' Rights, 155/96 (27 October 2001), par. 58.

²⁶⁹ See par. 50-69.

²⁷⁰ See par. 69.

Effects of IHRL: The Court used IHRL doctrine as means of *balancing individual and community interests with economic development of the country*. It is a leading case elaborating the right of peoples to dispose freely of their own natural resources, which undoubtedly has environmental implications.

6. Saramaka People v. Suriname, Inter-American Court of Human Rights (28 November 2007)

Facts: The government of Suriname granted concessions to mining and logging companies to carry out activities in the land that had been traditionally occupied and used by indigenous Saramaka people. The applicants alleged that encroachment to their ancestral land without their consent and any prior consultations violated their right to property.

Decision: The Court questioned whether and to what extent Saramaka people had a right to use and enjoy the natural resources that lay on their traditionally owned territory. It established that,

Accordingly, the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life. This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities' right to the use and enjoyment of their property.²⁷¹

Although the State might restrict the lands rights by granting concessions, it should have ensured that economic activities did not significantly affect their territory and natural resources. In this regard, the IACtHR listed the safeguards that need to be taken by the State:

“First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan... within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship

²⁷¹ [Saramaka People v. Suriname](#), Inter-American Court of Human Rights, 28 November 2007, par. 122.

that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.”²⁷²

In the present case, the Court decided that the State did not comply with these safeguards and therefore violated the right to property.²⁷³

Effect of IHRL: In this case, the Court used the right to property as a *balancing instrument between the communal land rights and the capacity of the State to use natural resources*. In this balancing exercise, effective participation of the indigenous community, benefit-sharing and prior environmental impact assessment are counted as the required safeguards which the State is obliged to meet.

7. Maya Indigenous Community of Toledo Districts v. Belize, Inter-American Court of Human Rights (12 October 2004)

Facts: The applicants alleged that the State party violated their rights under the Inter-American Convention by granting logging and oil concessions in the territory traditionally occupied and used by Maya people. They complained about the environmental damage caused by these concessions to their natural environment upon which Maya people depended for subsistence.

Decision: According to the Commission, one of the central elements of indigenous property rights is the requirement that the State should undertake effective and fully informed consultations with indigenous people regarding act and decisions affecting their traditional lands.²⁷⁴ In the present case, Belize failed to consult with Maya about logging and oil concessions.²⁷⁵ The Commission further established the positive obligation of Belize to supervise and monitor the logging activities to minimize the environmental harm:

Based upon the information presented, the Commission concludes that the logging concessions granted by the State in respect of lands in the Toledo District have caused environmental damage, and that this damage impacted negatively upon some lands wholly or partly within the limits of the territory in which the Maya people have a communal property right. The Commission also considers that this damage resulted in part from the fact that the State failed to put into place adequate safeguards and mechanisms, to supervise, monitor and ensure that it had sufficient staff to oversee that

²⁷² See par. 129.

²⁷³ See par. 158.

²⁷⁴ [Maya Indigenous Community of Toledo Districts v. Belize](#), Inter-American Court of Human Rights, Case 12.053, 12 October 2004, par. 142.

²⁷⁵ See par. 143.

the execution of the logging concessions would not cause further environmental damage to Maya lands and communities.²⁷⁶

The Commission also stated that development goals should not override the collective rights of the indigenous people and the protection of environment:

...development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.²⁷⁷

Effect of IHRL: The right to property of the indigenous people had been *interpreted as requiring both procedural and substantive obligations*. The requirement of prior consultation is a procedural obligation, while the obligations to supervise and monitor are of substantive nature.

8. Gabcikovo-Nagymaros Project (Hungary/Slovakia), International Court of Justice, (25 September 1997) (separate opinion of Judge Weeramantry)

Facts: Hungary and Czechoslovakia signed a treaty on the construction of a dam along the Danube River that bordered both countries. The joint investment aimed at the production of hydroelectricity without impairing the quality of water in the Danube. Due to environmental concerns, Hungary decided to suspend and subsequently abandoned the works. Czechoslovakia/Slovakia proceeded a “provisional solution” (damming up of the Danube at river kilometre 185 1.7 on Czechoslovak territory).²⁷⁸

Decision: The Court decided that Hungary was not entitled to suspend and subsequently abandon the works on the project, while Czechoslovakia was entitled to proceed the provisional solution but not entitled to put it into operation. Judge Weeramantry agreed on the above conclusions but issued a separate opinion.

In his separate opinion, he addressed three questions dealing with aspects of environmental law: the principle of sustainable development in balancing the competing demands of development and environmental protection, the principle of continuing environmental impact assessment, and the question of the appropriateness of the use of an *inter partes* legal principle such as estoppel in the

²⁷⁶ See par. 147.

²⁷⁷ See par. 150.

²⁷⁸ [Gabcikovo-Nagymaros Project \(Hungary/Slovakia\)](#), International Court of Justice, 1997 ICJ 35, 25 September 1997.

resolution of issues with *erga omnes* implications such as a claim that environmental damage is involved.

According to Judge Weeramantry,

the problem of steering a course between the needs of development and the necessity to protect the environment is a problem alike of the law of development and of the law of the environment. Both these vital and developing areas of law require, and indeed assume, the existence of a principle which harmonizes both needs.²⁷⁹

The principle of sustainable development is the needed principle. In explaining this principle, he firstly referred to Article 1 of the Declaration on the Right to Development, which suggests that "the right to development is an inalienable human right." Then, he argued that the place of the protection of environment is vital in the human rights doctrine:

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.²⁸⁰

As he argued, human rights and environmental law are among the components of the principle of sustainable development.²⁸¹

Under the principle of continuing environmental impact assessment, he elaborated the status of environmental rights:

Environmental rights are human rights. Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of their time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights.²⁸²

Effect of IHRL: Judge Weeramantry proposed an *inseparability thesis* between the protection of human rights and the protection of the environment, making the latter as a condition of the enjoyment of the former. In this vein, the right to sustainable development cannot be interpreted in ways that may contradict the enjoyment of human rights or the decay of the environment. The latter must jointly enjoy lexical priority.

²⁷⁹ See page 90 in the separate opinion.

²⁸⁰ See page 91-92 in the separate opinion.

²⁸¹ See page 95 in the separate opinion.

²⁸² See page 111 in the separate opinion.

9. Urgenda Foundation v. The State of Netherlands, Hague District Court (24 June 2015)

Facts: Urgenda was a citizens' platform with members from various domains in society, such as the business community, media communication, knowledge institutes, government and nongovernmental organisations. The platform was involved in the development of plans and measures to prevent climate change. Urgenda requested the State to commit and undertake to reduce CO₂ emissions in the Netherlands by 40% by 2020, as compared to the emissions in 1990. Before the Court, it argued that the State would have acted unlawfully if it had failed to have exact reductions.

Decision: The Court, through citing several scientific reports on gas emissions and climate change, and relevant European, international and national legal documents,²⁸³ questioned whether the State was in breach of its duty of care for taking insufficient measures to prevent dangerous climate change. On the question of whether the State would be in breach of Urgenda's personal rights, the Court was of the view that Urgenda could not directly rely on Articles 2 and 8 of the ECHR.²⁸⁴ However it referred to the jurisprudence of the ECtHR on Articles 2 and 8 "as a source of interpretation when detailing and implementing open private law standards in the manner...such as the unwritten standard of care of Book 6, Section 162 of the Dutch Civil Code."²⁸⁵ It quoted from the Manual on human rights and the environment to explain the interpretation of Articles 2 and 8.²⁸⁶

The Court concluded that given the high risk of hazardous climate change, the State had a serious duty of care to take measures to prevent it, and ordered the State to reduce annual Dutch greenhouse gas emissions at least 25% by 2020.

Effect of IHRL: In this case IHRL, as a source of interpretation, had the role of *developing substantive environmental obligation* such as the duty to prevent climate change. This duty has been seen as a part of the "duty of care" in the Dutch domestic law.

²⁸³ [Urgenda Foundation v. The State of Netherlands](#), Hague District Court, Case no. C/09/456689, 24 June 2015, par. 2.35- 2.70 citing and quoting respectively the [UN Framework Convention on Climate Change](#) (1992); [Kyoto Protocol](#) (1997) and [Doha Amendment](#) (2012); [Bali Action Plan](#) (2007); [Cancun Agreements](#) (2010); Articles 191, 192, 193 of the [Treaty on the Functioning of the European Union](#); [Decision no 1600/2002/EC of the European Parliament and of the Council](#); and the [Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009](#). See also par. 4.11-4.29.

²⁸⁴ See par. 4.45 citing [Identoba and others v. Georgia](#), European Court of Human Rights, App. No. 73235/12, 12 May 2015; [Van Melle and others v. the Netherlands](#), European Court of Human Rights, App. No. 19221/08, 29 September 2009.

²⁸⁵ See par. 4.46.

²⁸⁶ See par. 4.47-4.50.

10. Pulp Mills on the River Uruguay (Argentina v. Uruguay). International Court of Justice (20 April 2010) (dissenting opinion of Cançado Trindade)

Facts: The dispute arose out of the authorization, construction and future commissioning of two pulp mills on the River Uruguay. In particular, it concerned the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river.

Decision: The Court found that Uruguay had violated its procedural obligations to notify and consult with Argentina prior to authorizing and/or constructing the pulp mills. For the first time, ICJ recognized that the obligations to protect and preserve the environment require carrying out environmental impact assessment.²⁸⁷

Judge Cançado Trindade, in his dissenting opinion, addressed the theory of “intergenerational equity” which derived from the UDHR, ICCPR and ICESCR.²⁸⁸ According to him, a continuous obligation to monitor should have been linked to this theory, and the Court failed to see this aspect:

Inter-generational equity thus came to the fore in connection with the acknowledgement, by both Parties, of the “principle of sustainable development”, which, in their views, played a role in the interpretation and application of the 1975 Statute, displaying concern for seeking to secure the welfare not only of present but also of future generations. In this respect, in approaching the “continuing obligations” of “monitoring” in the present Judgment, the Court should have expressly linked this important point to inter-generational equity. As it did not, it unnecessarily and unfortunately deprived its own reasoning of the long-term temporal dimension, so noticeably present in the domain of environmental protection.²⁸⁹

Effect of IHRL: The principle of intergenerational equity introduced by Judge Trindade has a role of *enhancing the substantive obligation* to monitor long-term environmental impact. This effect was achieved by adding the principle of intergenerational equity, which derived from human rights instruments, to the principle of prevention and the precautionary principle.

²⁸⁷ See par. 204.

²⁸⁸ See par. 118 in the separate opinion, quoting Article 1 and the preamble of the Covenants which state the obligation to ensure that “the needs and interests of present and future generations are fully safeguarded.”

²⁸⁹ See par. 124 in the separate opinion.



The Effects of International Human Rights Law on other Branches of Public International Law:

An Annotated Compilation of Case Law

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