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THE INTEGRATION BETWEEN
THE NORMS OF INTERNATIONAL
HUMANITARIAN AND HUMAN
RIGHTS LAW**

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THE RIGHT TO LIFE IN LIGHT OF THE INTEGRATION BETWEEN THE NORMS OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW²

This paper casts doubts on the existence of a contradiction between the norms of International Humanitarian Law and International Human Rights Law in the sphere of the protection of the right to life and concludes that the wording and systematic interpretation of international treaties, and the subsequent application allowing the inference of an integrated approach to the determination of the negative and positive obligations of states in respect of the right to life.

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Introduction

When special international bodies competent to deal with breaches of the rules dedicated to the protection of victims of armed conflicts and the limitation of the means and methods of combat, that is, with International Humanitarian Law, still do not exist, victims of these violations have started to bring their cases before the international and regional human rights bodies which apply International Human Rights Law. This new wave of cases has brought questions on the relationship between the norms of International Humanitarian and Human Rights Law to the level of the most problematic issues of modern International Law.

A doctrinal approach to the relationship between these two branches of International Law, namely International Humanitarian and Human Rights Law, which are applicable in armed conflicts, has undergone significant changes. Despite the fact that the applicability of international treaties on human rights directly following from their texts, the role of International Human Rights Law in the regulation of relations occurring in these specific situations has, for quite a long period of time, been neglected because of the predominant conception that human rights norms were displaced by *lex specialis* norms of International Humanitarian Law. Slowly this concept is changing. Legal scholarship and the practice of international bodies has started to use such notions as “complementarity” and “integration”³. Although an acknowledgment of the complementarity of these norms does not give any guarantee of their absolute compatibility.

In this context the right to life illustrates a contradiction between particular norms of both branches of International Law which can be solved only by the application of *lex specialis derogat legi generali*. A decision on which norms are to be qualified as special has been made either in favour of International Humanitarian Law following the opinion of the International Court of Justice⁴, or depending on particularities of a concrete situation⁵. However, the texts of international treaties and the practice of their application by international judicial and quasi-judicial bodies casts doubts on the existence of such a contradiction.

³ See: Human Rights Committee (HRC), General Comment No. 31, 11; Cordula Droegge, “Elective affinities?”, 90 (871) *Human Rights and Humanitarian Law*, 2008, 521-522; Alston P., Morgan-Foster J., Abresch W., “The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the “War on Terror””, 19 (1) *European Journal of International Law*, 2008, 191-196; Heintze H.-J., “On the Relationship Between Human Rights Law Protection and International Humanitarian Law”, 86 (856) *International Review of the Red Cross* (IRRC), 2004, 793.

⁴ International Court of Justice (ICJ), Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 25; Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 106.

⁵ Sassoli M., Olson L., “The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts”, 90 (871) *IRRC*, 2008, 614.

1. An overview of the main theories of the relationship between International Humanitarian and Human Rights Law

The relationship between the two branches of International Law applicable in armed conflicts – International Humanitarian Law and International Human Rights Law – has been described by three main theories: competitive, complementary and integrative.

The key point of the competitive theory is the impossibility of the simultaneous applicability of both branches, denoting International Humanitarian Law as *lex specialis* which therefore excludes the applicability of International Human Rights Law⁶. Supporters of this approach insist that there are significant differences between the norms of these branches in their origin, sense, content and development⁷.

The second theory is based on a partial overlap and the mutual complementarity of these branches of International Law⁸. This approach is reflected in two Advisory Opinions of the International Court of Justice: *on the Legality of the Threat or Use of Nuclear Weapons* in 1996⁹ and *on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in 2004¹⁰.

The integrative theory recognizes the possibility of a full or partial merger of the norms provided by International Humanitarian Law and International Human Rights Law¹¹. The majority of authors sharing this approach, focus on the possibility of a full or partial unification of both branches of International Law under a common umbrella. Some of them, for instance, Pictet, use the notion of “International Humanitarian Law” as a generic term, others, for instance Draper, a term of “International Human Rights Law”¹². However, the possibility of such a unification does not answer the question of how it would be applied and has a scholastic character. An acknowledgement of a merger under a common notion is not able to say whether norms of International Human Rights Law are applicable in armed conflicts or whether norms of this branch are displaced by norms of International Humanitarian Law, which can be regarded as *lex specialis*.

⁶ Gasser H.-P., “International Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: Joint Venture or Mutual Exclusion?”, 45 *German Yearbook of International Law*, 2002, 154, 161; Schaefer B., *Zum Verhaeltnis Menschenrechte und humanitaeres Voelkerrecht* (Universitätsverlag Potsdam, Potsdam, 2006), 38–39.

⁷ Meyrowitz H., “Le droit de la guerre et les droit de l’homme”, 88 *Revue du droit public et de la science politique en France et à l’étranger*, 1972, 1059–1104.

⁸ Partsch K. J., “Human Rights and Humanitarian Law”, in *Encyclopedia of Public International Law* (Oxford University Press, Oxford, 1995), 910; Greenwood Ch., Scope of Application of Humanitarian Law in *The Handbook of Humanitarian Law* ed. by Dieter Fleck, 2nd ed., (Oxford university Press, Oxford, 2008), 74–75.

⁹ ICJ, Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 25.

¹⁰ ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, 106 URL: <http://www.icj-cij.org/docket/files/131/1671.pdf> >.

¹¹ Schaefer B. Op. cit. S. 35.

¹² Draper G.I.A.D., “The Relationship between the Human Rights Regime and the Law of Armed Conflicts” (1) *Israeli Yearbook on Human Rights*, 1971, 191–207; Kartashkin V.A. *Prava cheloveka: mezhdunarodnaya zashita v usloviyakh globalizatsii*. (Moscow, 2011) 56–58; Biryukov P.N. *Mezhdunarodnoye pravo: Uchebnik dlya Vuzov* (Moscow, 2013), 528.

2. Negative Obligations: The Lawfulness of the Deprivation of Life

2.1. The approaches of International Humanitarian and Human Rights

Law

A common test used by international lawyers to examine the lawfulness of the deprivation of life depends on a particular situation. If it takes place in the framework of an armed conflict or gives rise to an armed conflict itself, International Humanitarian Law comes into operation. The criteria for the lawfulness of the deprivation of life under these norms is still disputed. Nevertheless, taking the position of the International Committee of the Red Cross into account¹³, the general rule could be formulated as follows: Any killing of a combatant, a member of the organized armed group or a person taking a direct part in hostilities during this period, is lawful if these persons are not *hors de combat*, if the use of force does not lead or has not led to losses among the civil population and the destruction of civil objects which would be excessive in respect of any military advantage gained, and that prohibited means and methods of warfare have not been used.

By contrast, international treaties on human rights provide for a general prohibition of an “arbitrary”¹⁴ or “intentional”¹⁵ deprivation of life. Insofar as the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights do not allow derogations from the right to life and the government may not use its right to derogate from Art. 2 of the Convention on Protection of Human Rights and Fundamental Freedoms (indeed, no state has used this option so far), the lawfulness of the deprivation of life in a situation of armed conflict should be examined using common criteria applicable to the evaluation of the lawfulness of a killing resulting from the use of force in peaceful situations. For these purposes various international judicial and quasi-judicial bodies, dealing with the protection of human rights, apply the same test, consisting of four main elements.¹⁶ Firstly, the use of force should be governed by a sufficient legal basis. Secondly, use of force should be “strictly proportionate” to such purposes as the defence of persons from unlawful violence, the undertaking of a lawful arrest, the prevention of escape or the quelling of a

¹³ Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law. ICRC, 2009.

¹⁴ Art. 6 (1) of the International Covenant on Civil and Political Rights (ICCPR), Art. 4 (1) of the American Convention on Human Rights, Art. 1 of the African Charter of Human and Peoples’ Rights.

¹⁵ Art. 2 of the Convention on Protection of Human Rights and Fundamental Freedoms.

¹⁶ UN Human Rights Committee (HRC), *Husband of Maria Fanny Suarez de Guerrero v. Colombia* (Communication Nº R.11/45), Views, 31.03.1982, U.N. Doc. Supp. No. 40 (A/37/40), 13.1-13.3, URL: <http://www.unhcr.ch/tbs/doc.nsf/0/44cf17fed78ca4e7c1256ab5002b7234?Opendocument>; European Court of Human Rights (ECHR), *McCann and Others v. the United Kingdom*, Judgment (Grand Chamber), 27.09.1995, 147-150, 192-194, 200, 211, 212; ECHR, *Andronicou and Constantinou v. Cyprus* (Appl. Nº 86/1996/705/897), Judgment of 9.10.1997, 171, 172, URL: <http://hudoc.echr.coe.int/>; Inter-American Commission on Human Rights (IACCommHR), *Armando Alejandro Jr. and Others v. Cuba*, Report Nº 86/99, 29.09.1999, 42, 45, URL: <http://www.cidh.oas.org/annualrep/99eng/Merits/Cuba11.589.htm>; Inter-American Court of Human Rights (IACtHR), *Neira Alegria et al. v. Peru*, Judgment, 19.01.1995, 69, 72, URL: http://www.corteidh.or.cr/docs/casos/articulos/seriec_20_ing.pdf.

riot or insurrection. Thirdly, the use of force should be “absolutely necessary”, that is, it must be used only as a last resort. Fourthly, preventive measures, including prudent planning of the operation should be taken, respecting all the abovementioned criteria and giving an effective warning about the use of force.

Under this strict test few cases of the use of lethal force in armed conflicts, which nevertheless fulfil the requirements of International Humanitarian Law, will be lawful. Moreover, these norms, directly entitle the combatants with the right “to take a direct part in hostilities”¹⁷. The question is how can this enabling norm, giving the right to use force and incapacitate enemy combatants, be compatible with requirements of International Human Rights Law on the absolute necessity and strict proportionality of use of the lethal force? The conclusion usually reached is that the approaches used in International Humanitarian Law and International Human Rights Law for the evaluation of the lawfulness of the use of force are incompatible, and, thus, only one can be applied.

2.2. A possible integration of the norms of both branches of International Law

There are, however, a number of grounds for doubting the contradiction between International Humanitarian Law and International Human Rights Law concerning the right to life. International treaties on human rights were adopted by the states which had already participated in treaties on International Humanitarian Law. Hence, it would be not logical, if the states had agreed to norms which are in direct contradiction to those adopted earlier. Norms of International Law are to be construed in light of the principle of system integration,¹⁸ which means that from all possible interpretations preference should be given to those which are not contradictory.¹⁹ The division of legal norms between branches of International Law is quite scholastic. In International Humanitarian Law and International Human Rights Law it is especially notable in two Additional protocols of 1977, which are dedicated to the protection of the victims of armed conflicts, as well as in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Moreover, the proper titles and specific borders of International Humanitarian Law and International Human Rights Law are still under dispute. Finally, the emergence of new customs occurs regardless of where the exact borders between the branches of International Law are drawn.

¹⁷ Art. 43 (2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977.

¹⁸ Art. 31 (1, 3 “c”) of the Vienna Convention on the Law of Treaties.

¹⁹ “*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*”, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, 37, URL: http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf

Consequently, it needs to be examined whether in the texts of international treaties as applied by international judicial and quasi-judicial bodies there is a real inescapable contradiction between the norms of International Humanitarian Law and International Human Rights Law in the field of the lawfulness of the deprivation of life occurring during an armed conflict. The question is whether the wording of the treaties excludes the possibility of analysing the lawfulness of the use of force on the basis of the joint application of rules taken from both branches of International Law.

The modern formulation of the “Martens clause” as contained in Art. 1 (2) of Additional Protocol I provides that: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”. “Other international agreements” can be understood as all treaty norms of International Law, applicable in armed conflicts and it can be concluded, that International Humanitarian Law is not an autonomous or self-contained system. It can be argued therefore, that the sources of this branch of International Law do not preclude the application of international treaties on human rights which grant wider protection to persons affected by an armed conflict.

In international treaties on human rights, the potential for contradiction is concentrated in a very strict test for the lawfulness of the deprivation of life, consisting of four criteria, as mentioned above. The wordings of the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights show that the prohibition of arbitrary killing is applicable in armed conflicts. Under the principle *ad impossibilia lex non cogit* it can only mean that the threshold of arbitrariness should be decreased in armed conflicts in comparison to peaceful situations. However, to which level? Theoretically, two answers can be given to this question.

The first is to use the rules of International Humanitarian Law to set the minimal standards of humanity²⁰ in armed conflicts for interpretation of a term “arbitrariness”. Though the relevant international treaties do not explicitly point to the possibility of applying these rules, it is a general principle of the interpretation of international treaties, that together with the context also “any relevant rules of international law applicable in the relations between the parties” should be taken into consideration²¹. Consequently, the term “arbitrariness” describing a killing as the result of the use of force in the course of hostilities can be interpreted in light of international humanitarian norms. Should this approach been chosen it would mean that the

²⁰ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment of 27 June 1986, 218, URL: <http://www.icj-cij.org/docket/files/70/6503.pdf>

²¹ Art. 31 (1, 3 “c”) of the Vienna Convention on the Law of Treaties.

system of international legal norms applicable to the protection of the right to life in armed conflicts remains unchanged after international treaties on human rights have come into force.

The second is to construe the spreading of the scope of the application of international human rights norms into armed conflicts as strengthening the protection of the right to life, which was previously provided for by the rules of International Humanitarian Law only, and thereby to develop and tighten the requirements applicable to the use of force in armed conflicts. This line of argumentation does not use the rules of International Humanitarian Law as the minimal standard for the protection of the right to life in armed conflicts.

As the wording of international treaties permits both arguments, it is necessary to examine which position was taken by international judicial and quasi-judicial bodies dealing with application of the relevant treaties, because their case-law should be taken into consideration as an important means of treaty interpretation²². All these bodies use norms of International Humanitarian Law – explicitly or implicitly – for the interpretation of the international treaties under which they were created.²³ The only exception is the Inter-American Commission on Human Rights that applies the provisions of International Humanitarian Law directly.²⁴ The decisions of all these human rights bodies on cases connected with the deprivation of life during armed conflicts show that they apply, in respect of civilians and persons *hors de combat*, the same prohibitions as those established by international humanitarian norms²⁵. On several issues these bodies were stricter and tightened the criteria applicable for the evaluation of the lawfulness of the use of force resulting into death. In particular, two bodies: the UN Committee on Human Rights and the European Court of Human Rights (ECHR) have already dealt with situations which could have been solved differently depending on which norms – International Humanitarian Law or International Human Rights Law – were applied.

²² Art. 31 (3 “b”) of the Vienna Convention on the Law of Treaties.

²³ See, for instance: HRC, *General Comment № 29*, States of Emergency (Article 4), 24.07.2001, 3, 9, 10, 11, 16, URL: <http://www.unhchr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361/>; *General Comment № 31*, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29.03.2004, 11, URL: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement>; African Commission on Human and Peoples' Rights, Report, 29.05.2003, *D. R. Congo v. Burundi, Rwanda and Uganda* (Communication 227/99), 82-84, URL: <http://caselaw.ihra.org/doc/227.99/view/>; IACtHR, *Bámaca-Velásquez v. Guatemala*, Judgment (Merits), 25.11.2000, 203 et seq., URL: http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf; *Case of the "Mapiripán Massacre"*, Judgment (Merits, Reparations and Costs), 15.09.2005, 114-115, URL: http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf; ECHR, *Esmukhambetov and Others v. Russia* (Application no. 23445/03), Judgment, 29.03.2011 (final: 15.09.2011), 76, URL: <http://hudoc.echr.coe.int/>; *Al-Skeini and Others v. The United Kingdom*, Judgment (Grand Chamber), 07.07.2011, 89, 143, URL: <http://hudoc.echr.coe.int/>.

²⁴ IACommHR, *Juan Carlos Abella v. Argentina*, Case 11.137, Report № 55/97, 18.11.1997, 157-171, URL: <http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm>; *Report on Terrorism and Human Rights*, 22.10.2002, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 61, 62, URL: <http://www.cidh.org/terrorism/eng/part.b.htm#C.%20%20%20%20%20%20%20%20%20%20LawInternational%20Humanitarian%20Law>.

²⁵ IACommHR, *Arturo Ribón Avila v. Colombia*, Case 11.142, Report № 26/97, 30.09.1997, OEA/Ser.L/V/II.95 Doc. 7 rev. at 444 (1997), 140, URL: <http://www.cidh.oas.org/annualrep/97eng/Colombia11142.htm>; HRCmtee, *John Khemraadi Baboeram and Others v. Suriname* (Communications № 146, 148–154/1983), Views, 4.04.1985, U.N. Doc. Supp. No. 40 (A/40/40), 187 in 94 *International Law Reports*, 1994, 377.

In 2003 in the Concluding Observations on the Report on Israel, the UN Committee on Human Rights expressed its concerns about “targeted killings”²⁶. In its justification Israel referred to international humanitarian norms, emphasizing that its actions did not breach the proportionality principle and only those persons who took a direct part in hostilities were targeted. In its response the Committee on Human Rights recommended that “before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted”²⁷. The same idea was included by the same Committee to the Concluding Observations on the Report on Israel in 2010.²⁸ By requiring the government to conduct operations to arrest not eliminate the suspected individuals, the Committee applied the test of necessity and proportionality typical of International Human Rights Law.

The application of the Convention on Protection of Human Rights and Fundamental Freedoms in armed conflicts was generally evaluated by the ECHR in cases connected with conflicts in the South-East of Turkey and in Chechnya. In Iraqi cases the lawfulness of the deprivation of life in course of hostilities has not become a matter of consideration so far, as applications about situations where there was use of lethal force have been limited by claims concerning the violation of procedural obligations under Art. 2 of the Convention, and these facts had not been investigated at all or an investigation had not been effective²⁹.

It follows from the judgments of the ECHR that during the examination of the lawfulness of the use of force the general context is not taken into account, rather there is an analysis of each specific situation³⁰. In doing so the Court differentiates situations, separating real battles from operations directed at the search for and detention of members of armed groups. By distinguishing these situations the ECHR took into account many circumstances among which were the level of equipment and training of parties to the conflict, their number and the intensity of the use of force.

In several cases - *Gul*³¹ and *Ogur v. Turkey*³², and *Khatsiyeva and Others v. Russia*³³ - the use of force by governmental armed forces was argued to be justified by the fact that the

²⁶ HRC, Concluding Observations, *Israel*, CCPR/CO/78/ISR, 21.08. 2003, 15, URL: <http://www.unhcr.org/refworld/docid/3fdc6bd57.html>.

²⁷ Ibid.

²⁸ HRC, Concluding Observations, *Israel*, CCPR/C/ISR/CO/3, 29.07.2010, 10, URL: www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.ISR.CO.3.doc

²⁹ See: ECHR, *Al-Skeini and Others v. The United Kingdom*, Judgment (Grand Chamber), 07.07.2011, URL: <http://hudoc.echr.coe.int/>

³⁰ ECHR, *Isayeva v. Russia* (Application № 57950/00), Judgment, 24.02.2005 (final: 06.07.2005), 180, URL: <http://hudoc.echr.coe.int/>; *Isayeva, Yusupova and Bazayeva v. Russia* (Appl. № 57947/00, 57948/00 and 57949/00), Judgment, 24.02.2005 (final: 06.07.2005), 178, URL: <http://hudoc.echr.coe.int/>; *Esmukhambetov and Others v. Russia* (Application no. 23445/03), Judgment, 29.03.2011 (final: 15.09.2011), 76, 141, URL: <http://hudoc.echr.coe.int>.

³¹ ECHR, *Gul v. Turkey* (Application № 2267/93), Judgment, 14.12.2000, URL: <http://hudoc.echr.coe.int/>

³² ECHR, *Ogur v. Turkey*, Judgment, 20.05.1999, URL: <http://hudoc.echr.coe.int/>

³³ ECHR, *Khatsiyeva and Others v. Russia* (Appl. № 5108/02), Judgment, 17.01.2008 (final: 07.07.2008), URL: <http://hudoc.echr.coe.int/>

individuals killed were believed to be combatants. In these proceedings the relevant governments did not solely refer to the membership of targeted persons in armed groups, but emphasized that opening fire was in answer to attacks. In the former two cases it was alleged that shots were fired in the direction of the Turkish police and security forces, in the latter that a Russian armed forces helicopter was attacked from the ground. In these cases, neither the respondent governments, nor the ECHR made any reference to an armed conflict as such. In the *Khatsiyeva and Others* judgment the court, by formulating a list of circumstances which had not been clarified before the order to eliminate the group of men was given, did not point to the need to receive intelligence on the membership of these persons in an armed group at all³⁴.

Neither the proclamation of a situation being “armed” or “combat” (regardless, whether this occurs *ex ante* or *post factum*), nor the use of armed forces for conducting an operation, nor the type of the weapons used cumulatively or separately serve as decisive factors for deciding upon the lawfulness of the use of force, as the character of situation depends not on the official qualification of an operation, but on a whole range of circumstances. This shift of emphasis allows many abuses to go unpunished when situations occurring in the framework of an armed conflict are qualified by the state as “combat” situations, which is usually considered to be a “general indulgence” for the use of force. The position of the ECHR is that the principles of necessity and proportionality should be satisfied even in respect of the members of armed groups and as a result not in each and every circumstances will such killings be lawful. This means that the proliferation of the applicability of international human rights rules to armed conflicts has led to a tightening of rules related to the lawfulness of the deprivation of life as a result of the use of force: not all actions in conformity with the provisions of International Humanitarian Law would survive examination under the principles of necessity and proportionality. Approaches taken by the UN Committee on Human Rights and the ECHR confirm the applicability of the general test of necessity and proportionality used in peaceful situations to cases occurring in armed conflicts too³⁵.

This conclusion can be also deduced from the fact that by examining the proportionality of the use of force in situations that took place outside combat, the ECHR has never doubted the correctness of references used by the respondent governments on paras. “a” and “b” of Art. 2 (2) of the Convention, whilst in *Isayeva and Isayeva and Others* the court strongly criticized the line of argument presented by the Russian Federation, which justified the use of force in Chechnya – even in clear combat situations – by the necessity to protect persons from unlawful violence and

³⁴ Op. cit., 136.

³⁵ See also: “*Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*”, organized by the University Centre for International Humanitarian Law, Geneva, 1-2 September 2005, 12, URL: http://www.geneva-academy.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf.

to effect a lawful arrest under paras. “a” and “b” of Art. 2 (2) of the Convention. In judgments on these two cases the ECHR pointed out that this reference is not correct. Unequivocal references of the court to the need “to suppress an illegal armed insurgency” should be interpreted as an indication that these kinds of situations ought to be qualified under para. “c” of Art. 2 (2) as “actions lawfully taken for the purpose of quelling a riot or insurrection”³⁶. Examining the lawfulness of the use of force in combat situations during armed conflicts the ECHR applies the principle of necessity and proportionality, but it appraises whether the actions of the government in fact correspond to quelling a riot or insurrection. Therefore, the approach taken by this court does not consist in a choice of a more or less strict test of proportionality, that is, it is not a choice between a “law-enforcement” or a “military” paradigm, as is often highlighted by various scholars, but the application of the criteria of the absolute necessity and strict proportionality in respect of different purposes. As a matter of logic actions that are absolutely necessary and proportional for the purpose of quelling a riot or insurrection are not always necessary and proportional for stopping unlawful violence in respect of other lives or to arrest an individual.

In para. 25 of the *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, adopted in 1996, which was then cited in the *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 2004, the International Court of Justice stated:

...the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not to be arbitrarily 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, 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 itself³⁷.

There is a widely held belief that in this Advisory Opinion the International Court of Justice recognized that the lawfulness of the deprivation of life in armed conflict should be estimated on the basis of the applicable norms of International Humanitarian Law, which are

³⁶ ECHR, *Isayeva*, 180; *Isayeva and Oth.*, 178.

³⁷ ICJ, *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, 25.

more specific in comparison to the norms of International Human Rights Law³⁸. However, the court, by making reference in para. 25 to the applicability of International Humanitarian Law as *lex specialis*, in the following sentence concludes, that “whether a particular loss of life, 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”. This means that the court supposes that the norms of International Humanitarian Law, being more specific, clarify the rules on the prohibition of the arbitrary deprivation of life and does not necessarily insist on the existence of a legal contradiction which necessitates a choice between the two applicable norms. As a consequence, the position of the International Court of Justice expressed in this Advisory Opinion cannot be regarded as an insurmountable obstacle to the application of stricter requirements for the examination of the lawfulness of the use of lethal force deduced from the interpretation of international treaties on human rights.

2.3. An “integrated test” of lawfulness

Changes in the relationship between International Humanitarian Law and International Human Rights Law require a shift towards the application of an “integrated test” for the examination of the lawfulness of the deprivation of life in armed conflicts. This approach integrates the requirements of both branches of International Law in a unified system, where the prohibitions of International Humanitarian Law (majority of which are *jus cogens*) build up a minimum threshold of state interventions into the right to life and where International Human Rights Law adds some other criteria, namely proportionality and necessity. The use of this approach does not contradict the texts of international treaties on human rights and is based on a new version of their interpretation. A crucial role in this transformation has been played by the ECHR. However, the Inter-American Commission, and the Court of Human Rights have never dealt with a case where it would have been possible to deduce that in interpreting the prohibition of the arbitrary deprivation of life these bodies indeed limit themselves to the provisions of International Humanitarian Law only. Even if it were presumed that the Inter-American human rights bodies do not follow the “integrated approach” to the relationship of International Humanitarian Law and the provisions of the American Convention on Human Rights, all states who are party to this treaty have ratified the International Covenant on Civil and Political

³⁸ Droege C. “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict” 40 (2) *Israeli Law Review*, 2007, 338.

Rights³⁹. Therefore, under the principle of the performance of international treaties in good faith, by applying the Covenant the states of this Hemisphere should take into account the interpretation of Art. 6 given by the UN Human Rights Committee.

At the national level, there are already a few examples of the application of this “integrated test”: the Judgment of the Supreme Court of Israel on the *Targeted killings case*⁴⁰ and a decision of the Nepali National Human Rights Commission on Human Rights⁴¹. In 2006 the Supreme Court of Israel, deciding on whether the “targeted killings policy is totally illegal” and whether it “violates both the rights of those targeted and the innocent passers-by caught in the targeted killing zone”,⁴² has admitted the existence of a grey area, “about which customary international law has not yet crystallized”⁴³. In these circumstances the Supreme Court, having acknowledged that the policy of targeted killings was applied in the framework of an international armed conflict⁴⁴, articulated in its judgment four criteria to be satisfied in course of using force directed against persons suspected in terrorist actions: 1) “well based information” is needed before categorizing an individual as a combatant or a civilian; 2) “a civilian taking a direct part in hostilities cannot be attacked at such time as doing so, if a less harmful means can be employed”; “thus, if a terrorist, taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed”; 3) a thorough *post factum* investigation is to be performed; 4) damage caused to innocent civilians should be proportional⁴⁵. The second and the third requirements have clearly been borrowed from International Human Rights Law, as under International Humanitarian Law the applicability of the proportionality principle in respect of combatants and civilians taking a direct part in hostilities is very controversial⁴⁶, and International Humanitarian Law limits the duty to investigate the deaths in alleged war crimes⁴⁷. However, it can be argued that the situation in the Israeli-Palestinian conflict is unique and targeted killings were used in the occupied territories outside real combat

³⁹ Status of ratifications of the ICCPR at URL: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en and of the American Convention on Human Rights at URL: <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp> (last visited: 01.10.2012)

⁴⁰ The High Court of Justice of Israel, *The Public Committee against Torture in Israel v. The Government of Israel*. Judgment of 13 December 2006, 40, http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf (*Targeted Killings Judgment*).

⁴¹ Cited on: Poudyal K. P. “*The Role of national human rights institutions in armed conflict situations: with special reference to NHRC-Nepal*” (The Danish Institute for Human Rights, 2006), 88-87.

⁴² *Targeted Killings Judgment*, Para. 3.

⁴³ Op. cit., 40.

⁴⁴ Op. cit., 21.

⁴⁵ Op. cit., 40.

⁴⁶ Parks H. “Part IX of the ICRC «Direct Participation in Hostilities Study»: No Mandate, No Expertise, and Legally Incorrect” 42 *New York University Journal of International Law and Politics*, 2010, 783-830. But see: Pictet J. “Development and Principles of International Humanitarian Law”, Course, given in July 1982 at the University of Strasbourg as part of the courses organized by the International Institute of Human Rights (Martinus Nijhoff, Dordrecht, Boston, Lancaster, Geneva, 1985), 75-76.

⁴⁷ Art. 49, 50, 129 and 146 of the I-IV Geneva Conventions: for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, relative to the Treatment of Prisoners of War and relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Art. 121 of the III Geneva Convention, Art. 131 of the IV Geneva Convention.

situations, moreover, the Supreme Court has limited the scope of the application of the “lesser harm” method to those situations, when arrest is a “realizable” possibility⁴⁸. Nevertheless, it cannot be contested that this approach is a clear step toward the application of an “integrated test” to cases of the deprivation of life in armed conflicts.

In the second case the National Human Rights Commission of Nepal decided upon an incident which took place in 2003, when a group of Maoists, forcing students of the Higher Secondary School to be lectured on the so called “cultural program”, was attacked by the security forces. As a result alongside six Maoists, four children were killed and five children wounded. Taking into account, among other circumstances, that after being surrounded the Maoists did not open fire, and that they were very few in number and lightly armed, the Commission concluded that after a warning that should have been given, the Maoists could have been arrested. The final decision was that “there was a serious violation of humanitarian law both from the side of the Maoists and the security forces”⁴⁹.

Now let us look critically at the conclusion that there is a change in the standards of the evaluation of the lawfulness of the use of force in respect of persons taking a direct part in hostilities. Some scholars, as for instance, *Abresch*, argue that the approach taken by the ECHR does not correspond to international humanitarian provisions and should, therefore, be rejected.⁵⁰ In light of the principle of system integration and the speculative nature of the classification of legal norms into branches of Public International Law this line of argumentation is incorrect because International Humanitarian Law cannot be applied separately because its norms are an integral part of the whole system of international legal norms governing armed conflicts. Only in exceptional situations when International Human Rights Law would not be applicable, only the norms of International Humanitarian Law would govern the situation. Even if one were to theoretically try to compare the criteria applicable under this branch of International Law with the requirements of an “integrated test” the conclusion would be drawn that the provisions of International Humanitarian Law were included in this test as minimal standards, below which the threshold of human rights protection cannot go. Thus, the imposition of more severe additional requirements does not automatically contradict the norms of International Humanitarian Law. Moreover, none of the state-respondents in the cases decided by the ECHR have expressed protest against the application of an approach disseminating the criteria of absolute necessity and strict proportionality in situations of armed conflict.

⁴⁸ *Targeted Killings* Judgment, 40.

⁴⁹ Cited on: Poudyal K.P., Op. cit., 87-88.

⁵⁰ Abresch W. “A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya” 16 (4) *European Journal of International Law*, 2005, 742.

The impact of an “integrated test” can be questioned by reference to the fact that this approach has been used by international bodies which deal with the human rights protection, and whose jurisdiction is limited by the application of the relevant international human rights treaties. It can be argued that other judicial and quasi-judicial bodies, both international and national, are not bound by these instruments and reasoning. Though it is true that this approach is more human rights oriented, and bodies with a broader competence should not necessarily take an applicable international human rights treaty as a starting point, even these bodies will not escape the application of these instruments. The correct use of the norms of International Human Rights Law would demand taking into account the interpretation given by treaty bodies. Thus, even being able to apply the sources of both International Humanitarian and International Human Rights Law, other international judicial bodies are obliged to respect the interpretation of the human rights instruments, and they will hardly escape application of an “integrated approach”.

3. Positive Obligations: the investigation of deaths occurring during armed conflicts

The duty of states to investigate cases of deaths occurring during armed conflicts has been laid upon them by the norms of both International Humanitarian and International Human Rights Law. International treaties on International Humanitarian Law set up an obligation to carry out such an investigation only if it happened in a situation of international armed conflict, provided that the death can be qualified as a “war crime” and that the deceased individuals were either prisoners of war or interned persons. Nonetheless, a new international custom imposing an obligation to prosecute war crimes committed during non-international armed conflicts has already emerged⁵¹.

While neither regional nor international human rights treaties foresee a direct duty to carry out an investigation into the death of persons, the international judicial and quasi-judicial bodies have inferred this obligation by the interpretation of the right to life taken in conjunction with an obligation to respect and ensure the respect of human rights treaties⁵². These bodies also

⁵¹ Haenkerts J.-M., Doswald-Beck L. Customary International Humanitarian Law (Cambridge University Press, Cambridge, 2005) Vol. I, 781-785.

⁵² Art. 2 (1) and 6 of the International Covenant on Civil and Political Rights (ICCPR); Art. 1 (1) and 4 (1) of the American Convention on Human Rights; Art. 1 and 2 of the Convention on Protection of Human Rights and Fundamental Freedoms; Art. 1 of the African Charter of Human and Peoples’ Rights; Human Rights Committee (HRC), General Comment No. 31, 29.03.2004, 8, URL: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement>; ECHR, *McCann and Others v. the United Kingdom*, Judgment (Grand Chamber), 27 September 1995, 161, URL: <http://hudoc.echr.coe.int/>; IACtHR, *Velásquez-Rodríguez v. Honduras*, Judgment, 29 July 1988, 176-177, URL: http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.

unanimously acknowledge the applicability of the obligation to investigate in situations of armed conflict⁵³.

Therefore, the scope of the obligation to investigate the deaths of persons applied in armed conflicts needs to be clarified, taking into consideration the joint applicability of the norms of both International Humanitarian and Human Rights Law⁵⁴. The case-law of international judicial and quasi-judicial human rights bodies demonstrates two approaches to the determination of the scope of this obligation. The first approach consists of the restriction of this obligation in cases when there is a suspicion that substantial duties in respect of right to life have been breached⁵⁵. This position is, for instance, taken by the UN Human Rights Committee⁵⁶. The second – and wider – approach to the scope of this duty has been used by the ECHR.

In its judgment on *Kaya v. Turkey* of February 19, 1998 the court concluded that all the cases of the use of lethal force by state agents need “some form of independent and public scrutiny”⁵⁷. In addition, the ECHR always stresses that the authorities should act on their own initiative⁵⁸.

The Inter-American Court on Human Rights has referred to the obligation to conduct an effective investigation of extra-judicial, enforced and wilful executions⁵⁹, applying a limited approach to the obligation to undertake an investigation. However, in the *Montero-Aranguren* judgment of June 5, 2006 the court referring to the ECHR practice deduced a general obligation to investigate each case of the use of deadly force by state agents *ex officio*⁶⁰.

The ECHR, and following it the Inter-American Court on Human Rights, by requiring the states to conduct an investigation does not differentiate based on whether the death occurred in the course of an armed conflict or in the framework of a “law-enforcement” or “military”

⁵³ ECHR: *Güleç v. Turkey*, Judgment, 27 July 1998, 81; *Ergi v. Turkey*, Judgment, 28 July 1998, 79, 82; *Ahmet Özkan and Others v. Turkey*, Judgment, 6 April 2004, 85-90, 309-320, 326-330; *Isayeva v. Russia*, Judgment, 24 February 2005, 180, 210; IACtHR, Case of *Mapiripan Massacre v. Colombia*, Judgment, 15 September 2005, 238, URL: http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf; African Commission on Human and Peoples' Rights (AfCHPR), Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, October 1995, 21, 22, URL: http://www.achpr.org/files/sessions/18th/comunications/74.92/achpr18_74_92_eng.pdf.

⁵⁴ See: ICJ, Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 106.

⁵⁵ Resolution of the UN General Assembly № 63/182 “Extrajudicial, summary or arbitrary executions”, 18.12.2008, A/RES/63/182, 3, URL: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/182&Lang=E; ECOSOC, Resolution 1989/65 «Effective prevention and investigation of extra-legal, arbitrary and summary executions», 24.05.1989, 9, URL: https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ-ECOSOC/CCPCJ-ECOSOC-80/CCPCJ-ECOSOC-89/ECOSOC_resolution_1989-65.pdf; Human Rights Council, Resolution 7/16 “Situation of human rights in the Sudan”, 27.03.2008, 13, URL: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_16.pdf

⁵⁶ HRC, General Comment No. 06 “The Right to Life (Art. 6)”, 30 April 1982, 4, URL: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument); General Comment No. 31, 15.

⁵⁷ *Kaya*, 87.

⁵⁸ ECHR, *Ilhan v. Turkey*, 27 June 2000, 63; See also judgments of the IACtHR on: *Mapiripan* case, 257; *Velásquez*, 180.

⁵⁹ IACtHR: *Velasquez-Rodriguez*, 176-178, 188; *Case of the Moiwana Community v. Suriname*, Judgment, 15 July 2005, 145, URL: http://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf, *Bernabe Baldeon-Garcia v. Peru*, Judgment, 6 April 2006, 92, URL: http://www.corteidh.or.cr/docs/casos/articulos/seriec_147_ing.pdf.

⁶⁰ IACtHR, *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Judgment, 5 July 2006, 79, URL: http://www.corteidh.or.cr/docs/casos/articulos/seriec_150_ing.pdf

operation. The scope of the application of the positive obligations inferred from the right to life has been extended by international judicial and quasi-judicial human rights bodies from situations when the use of deadly force is attributable to the governmental party to the conflict or when it is not possible to figure out whose actions led to the death of a person, to situations when the use of deadly force is attributable to the insurgents⁶¹. Moreover, the obligation to carry out an investigation covers situations when the deceased person took a direct part in the hostilities⁶².

At first glance, it can seem that such an obligation to investigate cases of wilful deaths is too broad for a specific situation in an armed conflict because, as a result, measures of criminal responsibility will be taken only if a violation of material norms can be established. Consequently, the final outcome will be the same as in the case of the application of this obligation only in respect of alleged violations of the right to life, thus, it can be claimed that there is no sense to demand an investigation in all cases. However, the notion of “alleged violations” contains a very wide interpretation for those who finally decide on whether or not to open an investigation. Whereas in an armed conflict the possibilities of relatives of the deceased persons to file applications and require a criminal case to be opened can be seriously limited, and as a result a decision concerning the start of the relevant procedures can easily depend on the side that applied force.

The legitimacy of the use of force is a complicated question which requires not only the clarification of the applicable legal norms, but also to establish and qualify the facts. The use of a restricted approach to the obligation to investigate can lead to the situation when even *prima facie* violations of the right to life will not be investigated. Despite the fact that an investigation of all the cases of death of persons occurring in course of armed conflicts lays a heavy burden upon the state, it should be borne in mind that the unavailability of the examination of legitimacy of the use of force *post factum* can discipline an army (and all other subjects using force), and can serve as a guarantee for the state protecting it from ungrounded accusations of the disregard of human rights and International Humanitarian Law.

During the examination of the diligence of the investigation of the deaths of persons in armed conflicts, international judicial and quasi-judicial bodies apply the same criteria as those developed by them for situations of peace, among which are the principles of independence, adequacy, effectiveness, rapidness and openness of an investigation⁶³.

⁶¹ ECHR: *Kaya, Ergi*; IACtHR, *Velásquez-Rodríguez*, 172, 176; AfrCHPR, *Amnesty International and Others v. Sudan*, Decision, November 1999, 50, URL: <http://www1.chr.up.ac.za/index.php/browse-by-institution/achpr-commission/452-sudan-amnesty-international-and-others-v-sudan-2000-ahrlr-297-achpr-1999.html>

⁶² ECHR: *Kanlibaş v. Turkey*, Decision, 8 December 2005, 42; *Halit Çelebi v. Turkey*, Decision, 2 May 2006, 61.

⁶³ See.: ECOSOC, Resolution 1989/65 «Effective prevention and investigation of extra-legal, arbitrary and summary executions», 24.05.1989, URL: https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ-ECOSOC/CCPCJ-ECOSOC-80/CCPCJ-ECOSOC-89/ECOSOC_resolution_1989-65.pdf; Resolution of the UN General Assembly № 63/182 “Extrajudicial, summary or arbitrary executions”, 18.12.2008, A/RES/63/182, 3, URL: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/182&Lang=E; UN Commission on Human Rights (CommHR),

It also logically follows from the existence of an obligation to carry out an investigation that for the purposes of the examination of the legitimacy of the use of force that a principal role is played by documented information concerning a particular case. Nobody, including the commanders of each separate operation, is able to determine in good faith, whether in the course of the use of force the right to life was violated⁶⁴. A functioning system of gathering, storing and subsequently disclosing the relevant information would both control the lawfulness of orders, and “counter false accusations and would counter the suggestions made by some critics”⁶⁵.

The necessity of appropriate record keeping has been conformed in numerous decisions of international human rights bodies, which, when dealing with particular cases, require from the states the filing of evidence proving the lawfulness of the use of force. Very often the respondent states refuse to send necessary files, by making reference to different grounds, such as, for instance, a lack of relevant documents, the liquidation of archives after a certain period of time, declaring the information to be a military secret or making it secret due to its use in criminal proceedings. However, declarations made on behalf of respondents are not taken into account by the relevant international bodies which, in the absence of facts and evidence obviously proving the opposite, find the use of force to be wilful⁶⁶. Correspondently, the burden of prove shifts to the side of governments and this is justified, as even in peace-time individuals do not have the right to obtain the admissible evidence, it is hardly possible in the complicated situation of an armed conflict.

This analysis clearly shows that due to the subsequent practice of the application of the human rights treaties, the obligation to investigate cases of deaths occurring during armed conflicts has been significantly expanded in comparison with the requirements of International Humanitarian Law. In particular, states have a duty to document the facts and to carry out an effective investigation of all cases connected with the use of deadly force in armed conflicts, regardless of which party used such force and whether the relatives of the deceased refer to law enforcement bodies. These changes in the scope of the application and content of an international obligation to investigate the cases of deaths in armed conflicts should be taken into consideration by state bodies during particular operations, and should be reflected in domestic criminal law and criminal procedures, as well as in military instructions and manuals.

“Extrajudicial, summary or arbitrary executions”, A/CHR/RES/58/36, 2002, 5, URL: [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.2002.23++E.CN.4.2002.200.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.2002.23++E.CN.4.2002.200.En?Opendocument)

⁶⁴ See: CommHR, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 8 March 2006, E/CN.4/2006/53, 42, URL: <http://www.refworld.org/docid/45377b100.html>.

⁶⁵ Op. cit., 43.

⁶⁶ See: ECHR: *Esmukhambetov and Others v. Russia*, 29 March 2003; *Taysumov and Others v. Russia*, 14 May 2009; *Umayeva v. Russia*, 4 December 2008; *Mezhidov v. Russia*, 25 September 2008.

4. Conclusion

The wording and systematic interpretation of international treaties, and their subsequent application implies an integrated approach to the determination of both negative and positive state obligations in respect of the right to life in armed conflicts. The possibility of the integration of norms belonging to International Humanitarian and Human Rights Law, firstly, derives from the ability of former to serve as a limit for the restriction of human rights by a state in armed conflicts, and, secondly, follows from the expanding case-law of the main human rights bodies. The integration of the norms of International Humanitarian and Human Rights Law strengthens the protection of the right to life in armed conflicts, helping to solve the majority of cases belonging to the “grey areas” in favour of the individual. This indicates one of the recent developments in International Law and is a part of a global shift of the International legal system from state-oriented to human-oriented.

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