Beyond fragmentation: An issues-based approach to 'human rights'

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1 Introduction

Nicholas Murray Butler said, 'an expert is one who knows more and more about less and less until he knows absolutely everything about nothing'.[1] Yet many lawyers, and law academics in particular, spend their careers aspiring not only to become experts, but to become *the* expert on one or other narrowly defined niche area of law, that is to say knowing 'more and more about less and less ...'. Nevertheless, such experts are cumulatively responsible for generating a great deal of knowledge and understanding, and they are an indispensable component of the human rights movement.

In his convincing study, Pinker postulates that today we are in all probability living in the most peaceable era of our existence as a species.[2] This notwithstanding, no country goes unscathed by human rights abuses, and there are parts of the world in which the unthinkable happens daily. Conventional wisdom has been to generate more and more specialist knowledge to address such abuses. While this is certainly of immense importance to the fight against human rights abuses, this approach has failed to tilt the scales in this global fight. In this contribution I argue that lawyers whose goal it is to work towards social change, instead of creating theoretical knowledge,[3] should define their scope of work not by any formal sub-regime of international law, such as 'international human rights law' in the narrow sense, but should rather follow an issues perspective – the protection of life, for example. Such an approach brings with it many advantages, principle among which is the ability to draw

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[1]Although this is contested, this quote is generally attributed to Nicholas Murray Butler.

[2]Pinker *The better angels of our nature* (2011) at 1.

[3]The differentiation made here does not imply that academic research in human rights is relevant only in the theoretical discourse. Rather, the distinction made serves to identify those lawyers who are concerned in their work with the mobilisation of law.

on a wide range of norms and mechanisms to achieve a desired result. This implies that such lawyers should seek to gain knowledge on a broader range of legal regimes – in other words, they should know a little less about more.

It is the increased 'fragmentation' or 'diversification and expansion' (depending on one's point of view) of international law that necessitates an issues-based approach, for if all international law was general, any mobilisation of international law to address a concrete issue would, by definition, entail a more inclusive approach to the broader content of international law.[4] In light of this causal relationship between the need, or at least the space, for an issues-based approach to human rights, and the increased fragmentation of international law, the implications of fragmentation are considered in this contribution.

'Human rights' as used in the title of this contribution is a broader concept than 'human rights law' or 'international human rights law'. Indeed, 'human rights' is a movement that transcends the parameters of any one field of study. For purposes of this contribution I rely on those constitutive sub-regimes of international law that impact most directly on the physical integrity and well-being of human beings – what I consider the relevance of law to human rights in the broad sense – being international human rights law ('IHRL'), international humanitarian law ('IHL'), and international criminal law ('ICL'). Thus, the term 'human rights' in the title denotes these regimes cumulatively (as well as other relevant norms), and does not refer to the narrower technical concept 'human rights law', as a constitutive regime of international law.

2 An issues-based approach to international law

In his eloquent explanation of his approach to human rights law, Cassel argues,

> Where rights have been strengthened the cause is usually not so much individual factors acting independently ... but a complex interweaving of mutually reinforcing processes. What pulls human rights forward is not a series of separate, parallel cords, but a 'rope' of multiple, interwoven strands. Remove one strand, and the entire rope is weakened. International human rights law is a strand woven throughout the length of the rope. Its main value is not in how much rights protection it can pull as a single strand, but in how it strengthens the entire rope.[5]

The strength of a rope is not determined only by the number and quality of its

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[4] The term 'fragmentation' has an inherently negative connotation, and is contested. However, it has become a term of art, and will be used until such time as the proper character of the diversification and expansion of international law is addressed below.

[5] Cassel 'Does international human rights law make a difference?' (2001) 2 *Chi JIL* at 121, 123.

strands, but also by the way the strands are weaved together. Like IHRL, IHL, ICL, other regimes of international law also form strands in this rope. Studying these strands separately does not allow for the study of the pattern in which they are weaved together. In order to mobilise these regimes in a mutually reinforcing fashion, it is not only imperative to understand their relationship and interaction with one another, but also consciously to draw on the various advantages each regime offers, so as to work effectively towards securing the rights of people.

During his tenure as UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Alston dispensed with a number of issues in which the United States was implicated in potential violations of IHL. The United States, however, stubbornly maintained that IHL falls outside of the mandate of the Special Rapporteur, and that while IHRL forms the basis of his mandate, IHL applies to the exclusion of IHRL during armed conflict.[6] There was a time during which IHRL was deemed 'the law of peace' in contradistinction to 'the law of war', but today these arguments are untenable.

Starting with the *Legality of the Threat or Use of Nuclear Weapons* case, the International Court of Justice ('ICJ') has,[7] in a range of decisions,[8] concluded that IHRL and IHL co-apply during armed conflict, and while IHL is generally deemed the *lex specialis*, these regimes are, in the main, mutually reinforcing. Further, Alston convincingly dismissed the United States' allegation that IHL falls beyond the mandate of the Special Rapporteur by providing ample examples of instances in which 'The Commission on Human Rights, with the consistent endorsement of the Economic and Social Council, ... treated

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[6]The Special Rapporteur requested further information from the United States regarding the targeted killing of Haitham al-Yemeni (allegation letter sent on 26 August 2005, reproduced in Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, E/CN 4/2006/53/Add 1 (27 March 2006) 264-265). The United States government made out the above arguments in their response (Response of the Government of the United States of America dated 4 May 2006, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/4/20/Add 1 (12 March 2007) at 344-346).

[7]*Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ Rep 226 par 25.

[8]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Rep 136 par 106; and *Armed Activities on the Territory of the Congo* (*DRC v Uganda*) 2005 ICJ Rep 168. In the *Palestinian Wall* case at par 106, the court held 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation ... 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.'

international humanitarian law as falling within its terms of reference'.[9] Moreover, considering the fact that IHL and IHRL co-apply during armed conflict, any interpretation, in isolation, of either of these regimes in an instance where both find simultaneous application, is likely to produce incomplete or even incorrect conclusions. As such, it is legally unsound to interpret either of these regimes in isolation where they do find simultaneous application, as will be the case with issues such as targeted killings, and child soldiering, as the example below illustrates.

There is intuitive appeal to categorising and sub-dividing, as it creates order, and human beings tend to crave order. Although the network of loosely affiliated regimes that makes up international law lacks order, affiliating oneself to the parameters of one such regime is appealing as it is often believed that there is order to be found within such a regime. Once affiliated to a regime of law, lawyers, and more specifically academics, aspire to specialise further. An issues-based approach calls on lawyers to approach and characterise their work by the issue they are addressing, and not by the strict parameters of a regime of law. This approach may seem counterintuitive to some, but as is discussed further, it brings many practical advantages. Many, in particular practitioners, may respond that this is exactly what they do in their work, and this may be true. Nevertheless, adopting this approach consciously has broader implications than merely recognising the method of the approach in your work on an *ex post facto* basis.

During 2002 the International Law Commission ('ILC') embarked on a study on the 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law'.[10] A distinction was drawn between institutional and substantive perspectives, even during the planning stage of the study.

> While the former focused on concerns relating to institutional questions of practical coordination, institutional hierarchy, and the need for the various actors – especially international courts and tribunals – to pay attention to each other's jurisprudence, the latter involved the consideration of whether and how the substance of the law itself may have fragmented into special regimes which might be lacking in coherence or were in conflict with each other.[11]

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[9]Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/4/20 (29 January 2007) par 20.

[10]For the final report see Koskenniemi 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law Report of the Study Group of the International Law Commission' UN Doc A/CN 4/L 682 (13 April 2006) Report of the International Law Commission 56th session UN Doc A/59/10.

[11]Report of the International Law Commission 55th session UN Doc A/58/10 (5 May to 6 June and 7 July to 8 August 2003) par 416.

The advantages offered by an issues-based approach can be traced along the lines of this distinction. However, in order to do this effectively, the notion of the fragmentation, or diversification and expansion of international law must be considered.

3 Fragmentation, or the increased diversification and expansion of international law

Perceptions of the so-called fragmentation of international law differ vastly among commentators. For instance, while Hafner recognises the negative implications of fragmentation, he also argues that special norms, which exist as a result of fragmentation, 'may induce States to comply with international law more rigorously, and may contribute to a progressive development of international law'.[12] Bianchi, on the other hand, argues 'the extreme fragmentation of the theoretical discourse of international law may well lead to normative relativism and eventually, to the demise of the system'.[13]

Fragmentation denotes the cumulative effect of a number of changes to international law that have occurred by virtue of the rapid rate of growth (diversification and expansion) of this legal order over a relatively short period.[14] As noted earlier, these changes include both substantive and institutional aspects. On the substantive level, these changes include the regionalisation of international law; the recognition of hierarchal norms within international law – in particular *jus cogens* norms and obligations *erga omnes*; the expansion of the scope of application of international law – eg, the emergence of international human rights law; the expansion of legal personality beyond states; and finally, the expansion of special regimes within international law – both in number and in substantive content. On the institutional level, and as a direct result of the substantive expansion and diversification of international law, the major change has been the proliferation of tribunals competent to settle judicial disputes in international law finally. This specifically includes tribunals with overlapping jurisdiction.

In his seminal study, 'Holism and evolution', Smuts postulated that two conceptions of genesis have prevailed, the first 'regards all reality as given in form and substance at the beginning ... and the subsequent history as merely the unfolding, explication, *evolutio*, of this implicit content. This view puts

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[12]Hafner 'Pros and cons ensuing from fragmentation of international law' (2003-2004) 25 *Mich JIL* at 849, 863.
[13]Bianchi 'Looking ahead. International law's main challenges' in Armstrong (ed) *Routledge handbook of international law* (2009) 392 at 407.
[14]Hafner n 12 above at 849-850.

creation in the past and makes it predetermine the whole future'.[15] The second conception 'posits a minimum of the given at the beginning, and makes the process of evolution creative of reality. ... It releases the present and the future from the bondage of the past, and makes freedom an inherent character of the universe'.[16] Most theorists approach the fragmentation of international law from the supposition that it came about through Smuts's second conception of genesis. However, if the essence of the fragmentation of international law is the increase in size and number of international law regimes that apply to specific and limited situations, it seems that not only did the increased fragmentation of international law come about through Smuts's first conception of genesis, but it has always been an inherent characteristic of international law, albeit to a lesser extent.

The date of origin of international law remains a hotly contested subject among scholars. While there is archeological evidence of treaties among Sumerian tribes that date to 2000 BC,[17] and the *jus gentium* was a brand of international law that applied within Roman law as early as the period of classical antiquity,[18] prevailing opinion holds that modern international law commenced either in the wake of the Renaissance,[19] or after the signature of the Treaty of Westphalia in 1648.[20] Regardless of the period during which one believes international law came about, all these different conceptions of international law that have existed during the ages have included norms that enjoy limited application – specific or special norms in other words. For example, the Sumerian treaties mentioned above regulated the use of force and the conduct of hostilities. Similarly, early commentators on modern international law, such as Hugo de Groot (Grotius), often considered the father of international law, was preoccupied with war and maritime concerns.[21] As such, the inherent character of both modern international law, as well as conceptions of international law that have existed before, have been somewhat fragmented. It is more accurate to argue that the *increased* fragmentation of international law is a matter deserving of attention, rather than that *the* fragmentation of international law is deserving of such attention. If a margin of fragmentation has always existed in international law, increased

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[15]Smuts *Holism and evolution* (1927) at 87.
[16]*Ibid*.
[17]Friedman (ed) *The law of war: A documentary history* (1972) at 3; Bassiouni 'Repression of breaches of the Geneva Conventions under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949' (1976-1977) 8 *Rutgers-Cam LJ* at 185.
[18]Clark '*Jus gentium* – its origin and history' (1919-1920) 14 *ILR* at 243.
[19]See, eg, Dugard, *International law: A South African perspective* (2011) (3 ed) at 9.
[20]See, eg, Abass *Complete international law: Text, cases and materials* (2012) at 3-4.
[21]De Groot *De Jure Belli ac Pacis Libri Tes* (1625) is Hugo de Groot's most celebrated work, and is a treatise on the law of war and peace; whereas his earlier work, De Groot *Mare Liberum* (1609), dealt with maritime interests.

fragmentation will predictably accompany the diversification and expansion of international law.

Moreover, the very term fragmentation is contested. Commentators who work on international law theory, generally take a very apocalyptic stance with regard to fragmentation.[22] Those more concerned with the mobilisation of international law take a more positive stance. Simma, for instance, has noted a shift in perception in terms of which the discourse is no longer dominated by the so-called 'fragmentation of international law' – which has an inherently negative connotation – but rather increasingly engages terms such as 'diversity'.[23] Of course this shift does not imply that such diversification of international law does not have negative implications. The theme of the 105th annual meeting of the American Society of International Law well illustrates the duality of such diversification: 'Harmony and Dissonance in International Law'. Finally, there is a school of thought that the diversification of international law, together with the introduction of peremptory norms and the power of the United Nations Security Council to adopt binding resolutions in respect of matters that threaten international peace and security, instantiates a constitutional dimension to international law and its functioning.[24]

Commenting on the fragmentation of customary international criminal law, Schlütter argues, 'the proliferation of new international criminal tribunals, as well as the diverging views of the ICTY in the *Tadic* case and of the ICJ in the *Nicaragua* case on the imputability of acts of militia groups, often remain the only examples cited as evidence of the growing fragmentation of international law'.[25] To be fair, in other regimes of international law there are also good examples of this growing fragmentation, eg, the relationship between IHRL and IHL as addressed by the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* case,[26] the extent of WTO law's self-sufficiency, to name but two. Nevertheless, Schlütter makes the point well that fears regarding the negative aspects of fragmentation are aimed at highly improbably exceptions to the general way in which rules and regimes of international law operate in unison.

Interestingly, during a session entitled 'Decision-making in International Courts and Tribunals' former ICJ Judge President Higgins, and the President

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[22] See, eg, D'Amato 'A few steps toward an explanatory theory of international law' (2009-2010) 7 *Santa Clara JIL* at 1, 2.
[23] Simma 'Fragmentation in a positive light' (2003-2004) 25 *Mich JIL* 845 at 846-847.
[24] See, eg, Koskenniemi 'Constitutionalism as mindset: Reflections on Kantian themes about international law and globalization' (2007) 8 *Theoretical Inq L* at 9.
[25] Schlütter *Developments in customary international law* (2010) at 116.
[26] *Legality of the Threat or Use of Nuclear Weapons* n 7 par 25.

of the ICTY, Judge Meron, both largely dismissed concerns regarding a separate jurisprudential development among different tribunals in general, and in the context of the *Tadic* and *Nicaragua* cases[27] in particular.[28] Similarly, Judge Simma, also formerly of the ICJ, asserts that with only a few exceptions tribunals 'have displayed utmost caution in avoiding to contradict each other'.[29] Indeed, he argues that such caution on part of tribunals has resulted in instances where tribunals avoid addressing specific issues for fear of stepping on one another's toes.[30]

The argument has been made that comparing the attributability findings in the *Tadic* and *Nicaragua* cases is tantamount to comparing apples and oranges. The *Nicaragua* case addressed the attribution of the conduct of a non-state entity to a state, whereas, the *Tadic* case regarded attribution in the context of individual criminal responsibility. As such, the two tribunals' different findings are attributable, as it were, to differences in the substantive questions the respective tribunals were addressing. Ironically, dispelling arguments that these two judgments are examples of growing institutional fragmentation in this way, implies that there is indeed growing substantive fragmentation, as the argument is premised on the view that in international law, the rules of attribution are different in the contexts of state responsibility and individual criminal responsibility. However, this argument is not very persuasive, at least not in so far as it presumes that the ICTY Appeals Chamber considered itself to pronounce on a question which differed from that addressed by the ICJ thirteen years earlier. The discussion in the *Tadic* case of the finding in the *Nicaragua* case commences under the heading, 'The Nicaragua Test would not seem to be consonant with the logic of the law of state responsibility'.[31]

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[27] *Prosecutor v Duško Tadic* case IT-94-1-A Appeals Chamber 15 July 1999 pars 116-123; *Military and Paramilitary Activities in and against Nicaragua* 1986 ICJ Rep 14 pars 81-86.

[28] 'Harmony and dissonance in international law' 105th Annual Meeting of the American Society of International Law 'Decision-making in International Courts and Tribunals' with Charles Brower, Rosalyn Higgins, Theodor Meron, and Brigitte Stern (23-26 March 2011).

[29] Simma n 23 above at 847.

[30] *Id* at 846 'Such caution might sometimes come at the price of dodging issues that would very much have deserved to be tackled; an example being the way in which the Hague Court in the *LaGrand* case refused to decide the question whether the right of foreign nationals to information about consular notification had assumed the features of a human right in the context of the right to life, thus escaping the necessity of taking a critical stand *vis-a-vis* an advisory opinion of the Inter-American Court of Human Rights to that effect. It took the insistence of Mexico in the Avena case, shortly following *LaGrand*, to force the International Court of Justice to unambiguously reply in the negative. *Si tacuisses*. I would venture to submit that, as a rule, international judges or arbitrators have to experience an extreme sense of urgency before they would decide to straight-up contradict their colleagues in another international jurisdiction. And if such sense of urgency were based on genuine concerns about the state of development of an international legal matter, the ensuing divergencies in international jurisprudence might be welcome triggers of progress in the law.'

[31] *Prosecutor v Duško Tadic* n 27 above at par 116.

Be that as it may, even if one accepts that concerns regarding the practical implications of the growing expansion and diversification of international law are often over emphasised, as I do, conventional international law has increasingly developed around sub-regimes of international law, and the discourse on these various regimes of law has increasingly become more and more distinct. Customary international law forms an interesting and useful entry point for an issues-based approach. Where conventional international law has developed in a way that sets of norms are packaged into semi-autonomous regimes of international law, customary international law, at least to some extent, transcends these sometimes artificial parameters.

3.1 The formation of customary norms and the defragmentation of international law

Customary law is 'international custom, as evidence of a general practice accepted as law'.[32] To find the existence of a customary norm both *usus* as well as *opinion juris sive necessitatis* is required to be present; that is, state practice and the belief that such custom applies as a matter of law.[33] General state practice dictates that there can only be one customary rule on one issue.[34] This begs the question whether state practice can be discernibly divided between such practice giving rise to an IHRL rule, and such practice giving rise to an IHL rule, thus creating two separate norms. The methodology of the ICRC study on 'Customary International Humanitarian Law' placed equal reliance on state practice founded on IHRL as it did on state practice founded on IHL.[35] The Special Court for Sierra Leone, too, followed this reasoning.[36] Such an approach is warranted as the ICRC study states that IHRL was included in state practice as 'international human rights law continues to apply during armed conflicts'.[37] On this basis, it is accepted that state practice, in the

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[32]Article 38(b) of the Statute of the International Court of Justice, Annexed to the Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI.

[33]This traditional conception of the constitutive elements of customary international law was recently reasserted by the ICJ in *Jurisdictional Immunities of the State*, not yet reported (2012), at par 51.

[34]Villiger *Customary international law and treaties* (1997) 30; Sassòli and Olson 'The relationship between international humanitarian and human rights law where it matters: Admissible killing and internment of fighters in non-international armed conflicts' (2008) 90/871 *ICRC Review* at 599, 605.

[35]Henckaerts and Doswald-Beck *Customary international humanitarian law, volume I: Rules* (2007) at xxxi.

[36]*Prosecutor v Sam Hinga Norman* Decision on Preliminary Motion Based on Lack of Jurisdiction, case SCSL-2004-14-AR72(E) Appeals Chamber 31 May 2004 pars 14-16 and 19, where it was held '... all but six states had ratified the Convention on the Rights of the Child by 1996. This huge acceptance, the highest acceptance of all international conventions, clearly shows that the provisions of the CRC became international customary law almost at the time of the entry into force of the Convention.'

[37]Henckaerts n 35 above xxxi.

guise of IHRL obligations, can bolster the threshold state practice required for the existence of a customary IHL rule. The question, then, is whether this is equally true working from the other side.

Unlike IHRL's continued application during times of armed conflict, IHL does not apply during times of peace. Therefore, strictly speaking, if the ICRC argument is followed, reliance should not be placed on state practice emanating from within IHL to find a customary rule in IHRL. Furthermore, the substantive content of state practice within the IHL and IHRL realms should also be considered. For example, the now established IHL customary rule that 'children must not be allowed to take part in hostilities' has corresponding IHRL state practice, and indeed is founded in part, upon such state practice.[38] It is impossible for this part of the substantive IHRL to apply during times of peace as it directly speaks to participation in hostilities. Therefore, the degree of overlap between the relevant state practice from within IHL and IHRL is directly proportional to each other. In contrast, recruitment (as opposed to 'use') is prohibited during times of peace. The degree of overlap between state practice within IHL and IHRL is thus reduced, and state practice from within IHL cannot contribute to the existence of a customary IHRL norm applicable during times of peace. However, it can so contribute in relation to that customary norm as it applies during armed conflict. Nevertheless, overwhelming state practice supports the existence of a customary rule to the effect that 'children must not be recruited into armed forces or armed groups', during times of peace and during armed conflict. This example serves to indicate that the role of state practice in the formulation of customary norms is, at least in part, issues-based, and not exclusively regime-based. As such, this characteristic of customary international law shares the same premise as the proposed issues-based approach to human rights.

Of course, the ability of state practice from within two distinct regimes of international law to inform the formation of a single customary norm is directly dependent on the nature of the regimes in question, their relationship to one another, and the nature of the norm in question – in particular the degree of overlap between the relevant norms. In her analysis of the jurisprudence of the ICTY, Ruiz-Fabri concluded that the ICTY and ICTR are very effective in applying customary international law within the disciplinary confines of international criminal law.[39] Nevertheless, within the context of an

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[38]Henckaerts and Doswald-Beck (eds) *Customary international humanitarian law, volume II: Practice, part V* (2007) at 3128-3141.

[39]Ruiz-Fabri 'Commentaire sur le rapport de Lorenzo Gradoni' in Delmas-Marty, Fronza and Lambert-Abdelgawad (eds) *Les Sources du Droit International Pénal* (2005) at 383 387. 'le rapport de Gradoni me semble moins démontrer une véritable spécificité de la coutume en driot international pénal qu'une utilisation assez maiîtrisée par le tribunal pénal international, ce qui,

issues-based approach, the relevant regimes of law invariably will bear a close relationship to one another, and in particular, the norms relevant to the issue will overlap.

4 The benefits of an issues-based approach

An issues-based perspective is one which would further the goals of those who view the law as an instrument to achieve ends.[40] Skeptics, argue that such an instrumentalist conception of law implies that the law is merely a mechanical system, and an unscrupulous lawmaker can manipulate its content to achieve any end desired.[41] Moreover, many consider the law to be an instrument through which one group can dominate another, or several others.[42] Indeed, there are many examples to support the contention that these points of critique are accurate. The maintenance of apartheid through law in South Africa for many decades, is an example that well illustrates both points of critique. For most of the apartheid era South Africa was, constitutionally, based on a Westminster parliamentarian system, the separation of powers was observed, and there was a very well-functioning judiciary. This system of government, and of lawmaking, is still one of the most widely used constitutional systems internationally. Thus, the content or substance of the law is not determined by the nature of the system, but by the people who 'make' the law. Nevertheless, today there are many minimum standards to which states must adhere within their municipal law.

4.1 The progressive development of conventional law

Mention was made earlier of customary international law, to some extent, transcending the rigid categorisation of internatiuonal law 'regimes'. Conversely, conventional international law has spearheaded this rigid categorisation. In adopting an issues-based approach, it is important to note that different regimes within international law develop at a different pace. Within the context of the broader human rights movement, IHL and IHRL are the most relevant regimes.

The history of IHL differs greatly from that of IHRL. Modern IHL's first written incarnations appeared in the form of the Lieber Code and the first Geneva Conventions, of 1863 and 1864 respectively.[43] By that time IHL had

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tant en termes de souce que de méthodologie, contribue ... au développement et du droit international'.

[40] See, eg, Tamanaha 'The tension between legal instrumentalism and the rule of law' (2005-2006) 33 *Syracuse JIL and Com* at 131.

[41] *Ibid*.

[42] *Ibid*.

[43] Lieber Code, Instructions for the Government Armies of the United States in the Field (1863); Convention for the Amelioration of the Condition of the Wounded in Armies in the Field,

enjoyed a very long history in customary practice.[44] Indeed, custom has always dictated practice during armed conflict, and, as mentioned, by 2000 BC the Egyptians and Sumerians had treaties in place regulating the initiation and conduct of armed conflict.[45] Conversely, in the case of IHRL, a much more recent legal phenomenon, custom has followed treaty obligations. The internationalisation of human rights law emerged after the First World War and was mainstreamed in the form of the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights, of 1948.[46] Hereafter, state practice followed suit resulting in a large body of customary international law. Much of the resulting customary norms cannot realistically be discerned as properly belonging only to IHl or only to IHRL.

Ever since the emergence of IHRL, commentators have been divided on the nature of the relationship between IHRL and IHL. Some commentators began drawing parallels between these two legal regimes.[47] These parallels resulted in a two-dimensional narrative along the lines that the influence of IHRL is progressively 'humanising' IHL;[48] and that these two bodies of law are developing towards a 'convergence' or 'fusion'.[49] However, other commentators are more wary of these arguments – during 1967 Bassiouni wrote that 'the humanization of armed conflict has been the object of regulation and concern by every civilization for centuries';[50] thus long preceding the emergence of IHRL. Furthermore, during 1979, Draper warned against this new movement towards the 'fusion' of these legal regimes saying that IHRL and IHL are 'diametrically opposed'.[51]

Notwithstanding the contentious nature of the relationship between IHRL and IHL, it is clear that the nature of this relationship has changed over time. One

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Geneva (1864).

[44]Bernhardt *Encyclopedia of public international law, volume II* (1992) at 933-936; Ober 'Classical Greek times' in Howard, Andreopoulos and Shulman (eds) *The laws of war: Constraints on warfare in the western world* (1994).

[45]Friedman n 17 above at 3; Bassiouni n 17 above at 185.

[46]The Universal Declaration of Human Rights GA res 217 A (III) 10 December 1948.

[47]Early commentators included Draper 'Humanitarian law and human rights' (1979) *Acta Juridica* 193 at 199 and 205; Orakhelashvili 'The interaction between human rights and humanitarian law: Fragmentation, conflict, parallelism, or convergence?' (2008) 19 *EJIL* at 161; and Orakhelashvili 'The interaction between human rights and humanitarian law: A case of fragmentation'(2007) International Law and Justice Colloquium New York University at www.iilj.org/research/documents/orakhelashvili.pdf; Arnold and Quenivet (eds) *International humanitarian law and human rights law: Towards a new merger in international law* (2008); Doswald-Beck and Vit´e 'International humanitarian law and human rights law' (1993) 293 *Intl Rev Red Cross* at 94, 99; Abresch 'A human rights law of internal armed conflict: The European Court of Human Rights in Chechnya' (2005) 16 *EJIL* at 741, 742.

[48]Meron 'The humanization of humanitarian law' (2000) 94 *AJIL* at 239 -278.

[49]Draper n 47 above.

[50]Bassiouni n 17 above at 185.

[51]Draper n 47 above at 199 and 205.

of the resolutions adopted at the UN Conference on Human Rights held in Tehran during 1968, for instance, was entitled 'Human Rights in Armed Conflict', and provided, 'considering that peace is the underlying condition for the full observance of human rights and war is their negation …'.[52] As previously mentioned, today there is virtually universal agreement that both IHL and IHRL apply during armed conflict.[53] Indeed, an issues-based approach involving these regimes will not be possible had they not found simultaneous application.

The different histories of IHRL and IHL are relevant in an issues-based approach to the extent that they influence the development, and importantly, the pace of development of these regimes. In so far as conventional international law goes, IHL, which has developed over centuries, is a somewhat stagnant regime within international law. Although customary international humanitarian law is fluid, and there are variances in treaty interpretation over time, the last significant development in conventional international humanitarian law came in 1977 with the adoption of the two Protocols Additional to the Geneva Conventions. IHRL, on the other hand, is very dynamic. New treaty norms in this field are elaborated every year.

The dynamic nature of IHRL is such that the protective regime offered by international law can continuously be strengthened. This can be seen by parallel developments of law within the universal and the different regional human rights systems. Moreover, the politics of treaty negotiation are such that due to compromise, often in the pursuit of unanimity, the inherent protective qualities of a given norm or instrument more broadly, are often diluted. Again, the dynamic nature of IHRL provides the opportunity to re-engage with the same issue in a relatively short period of time – a possibility that does not arise within IHL.

This state of affairs has two implications for an issues-based perspective. First, in instances in which IHL is traditionally seen as the applicable regime, but to which IHRL nevertheless applies and where there is no norm conflict between IHL and IHRL, it may be wise consciously to rely on the relevant IHRL norms, which may well be better developed jurisprudentially, and may be more

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[52] Human Rights in Armed Conflicts. Resolution XXIII adopted by the International Conference on Human Rights Teheran 12 May 1968.

[53] Regardless hereof, these regimes maintain their own character to a very great extent. For instance, while the *jus in bello* realm of law concerns itself not with the lawfulness of conflict, but with its conduct and effects, there are developments within IHRL that view the existence of conflict a violation *per se*. Schabas argues that there is a right to peace, albeit underdeveloped. See, Schabas '*Lex Specialis*? Belt and suspenders? The parallel operation of human rights law and the law of armed conflict, and the conundrum of *jus ad bellum*' (2007) 40 *Isr LR* at 592, 593.

contemporary. Secondly, those advocating for legal reform may wish to use the instrumentality of IHRL to achieve goals that impact on the conduct of hostilities or the protection of victims of war. The reason for this is that reforming or revisiting established IHL instruments is highly unlikely. But the same does not hold true regarding IHRL. However, it will be wise to be cautious in this regard, as these regimes exist separately for a reason, and where one regime encroaches too much on the legislative territory of another, there is a real possibility of irreconcilable norm conflict.[54] The case study below addresses the benefits of an issues-based perspective as regards the progressive development of conventional law on a practical level.

4.2 Human rights education

The most important decisions on the enforcement and implementation of human rights issues are often made by politicians, activists, and NGO/IGO workers and advisors. Most of these role players lack in-depth knowledge of the legal regimes relevant to human rights when compared to academics. For the most part, the tertiary education exit level for such role players is either a master's degree, or a strong professional law degree (generally LLB/JD). A student may, for example, as often in fact happens, enrol for a course that deals with IHRL in isolation, without enrolling for any courses in IHL or ICL. It is, of course, true that one's knowledge of human rights expands exponentially in the workplace setting. But it is equally true that it is hard to dispel beliefs and points of view entrenched though formal education. Should the course content not reflect the potential contributions of other regimes in addressing concrete human rights issues, such as the child soldiering example used below, students' understanding of the law will be one dimensional.

An issues-based perspective will thus be of particularly importance to educators in fields such as IHRL, IHL and ICL. Accordingly, at the very least, educators should actively incorporate a basic level of understanding, or even just awareness, of regimes of law that reinforce the regime that forms the subject matter of the course in question. And ideally, the implications of the specific relationship shared by two or more relevant regimes should be canvassed. Again, it might well be more useful to offer students a little less detailed and isolated knowledge by focusing more on generating a more holistic or integrated understanding of the broader implications and potential of law to address issues of concern to human rights. It is certainly more

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[54]For example, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (entered into force 12 February 2002) 2173 UNTS 222, creates different obligations depending on the status of the party, this may arguably result in irreconcilable norm conflict between IHRL and IHL norms. For an analysis, see Waschefort *Child soldiers and international law* (forthcoming 2013).

feasible to instil awareness in a student of all the resources available within international law to address human rights issues, and to empower a student to seek the relevant knowledge specific to a concrete case, as it may arise in her professional career; than to impart detailed, but narrow information, on a *capita selecta* basis and with no exposure to other relevant elements of international law. Understanding, as it were, is in all likelihood more important than knowing.

4.3 Case study: The prohibition of child soldiering

The apex instruments that proscribe the use and recruitment of child soldiers in IHL and IHRL, proscribe such conduct in virtually identically terms. Additional Protocol I to the Geneva Conventions ('AP I'), an IHL instrument, provides

> The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.[55]

Whereas the Convention on the Rights of the Child ('CRC'), an IHRL instrument, provides

> States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. ... States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.[56]

There are only two material respects in which these provisions differ. The first is a product of the increased diversification or fragmentation of international law, and the second is merely a slight difference in substance. The IHL provision applies to 'The Parties to the conflict', whereas the CRC provision applies to 'States Parties'.

While there is a significant degree of overlap between IHL and IHRL, the *raison d'etre* for these regimes differs, and as function dictates form, so too do some of the structural norms that create the framework within which IHL on the one hand, and IHRL on the other, exist as separate regimes of international law. IHRL came into being to safeguard the rights and interests of the

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[55] Article 77(2) of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977 (entered into force 7 December 1978) 1125 UNTS 17512.

[56] Article 38 of the Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3.

individual from the extensive powers of the state. As such, IHRL creates obligations for states only.[57] Where the conduct of non-state entities is to be regulated through IHRL norms, this is done through the instrumentality of the state. For example, the CRC provides 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention'.[58]

IHL, on the other hand, exists to regulate the conduct of hostilities, and protect the victims of war, and applies only during international and non-international armed conflict. One of the underlying principles of IHL is the equality of belligerents, that 'the rules of international humanitarian law apply with equal force to both sides to the conflict, irrespective of who is the aggressor'.[59] Effect cannot be given to this principle if non-state entities who are party to a conflict, are not bound by IHL.[60] As such, and even though theoretically this phenomenon remains unexplained, there is general consensus that IHL binds both state and non-state entities party to an armed conflict.[61]

The second material distinction between these provisions relates only to substance. The AP I provision includes the words 'in particular', 'The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, *in particular*, they shall refrain from recruiting them into their armed forces'.[62] This indicates that the non-recruitment of child soldiers is one of the measures that states must employ to ensure that they have taken 'all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities'. Therefore, where a party to a conflict recruits a child younger than fifteen, the party's violation of this norm does not come by way of the recruitment in and of itself, but the party acts in violation of its duty to take all feasible measures to ensure that a child younger than fifteen does not take a direct part in hostilities. The CRC provision does not contain these words, and the non-recruitment and non-use of child soldiers are dealt with in

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[57]The notion of human rights obligations of non-state actors has received much attention of late, see, eg, Clapham *Human rights obligations of non-state actors* (2006). However, there is no doubt that the traditional concept of international human rights law is limited to obligations incumbent upon state parties, and that human rights treaties, such as the Convention on the Rights of the Child, reflect this conception of international human rights law.

[58]Article 4 of the Convention on the Rights of the Child n 56 above.

[59]Greenwood 'Historical development and legal basis' in Fleck (ed) *The handbook of international humanitarian law* (2008) at 11.

[60]Waschefort 'The pseudo legal personality of non-state armed groups in international law' (2011) 36 *SAYIL* 226 at 232-235.

[61]*Ibid*.

[62]Article 77(2) of Protocol I Additional to the Geneva Conventions n 55 above (emphasis added).

separate sub-sections. As such, the 'non-recruitment' of child soldiers is a norm in itself distinct from the 'non-use' of child soldiers.

Regardless of these differences, the prohibition of child soldiering is the substantive issue proscribed by both IHL and IHRL where the comparative norms most closely resemble one another. However, many viewed the fact that the CRC did not create greater protection for child soldiers than AP I as a great failure, and, during 1993, the UN Committee on the Rights of the Child entrusted one of its member with drafting a first preliminary text of a Protocol to the CRC on the involvement of children in armed conflict.[63] Ultimately this Protocol was opened for ratification during 2000, came into force on 12 February 2002, and currently has 151 states party. This indicates well how IHRL can contribute to the progressive development of issues that also fall within the ambit of the more stagnant IHL regime of law.

Often global norms are not well suited to address regional problems. IHL is a legal regime that applies globally, meaning that customary IHL norms apply to all parties to armed conflicts internationally (except, potentially, persistent objector states), and IHL treaties are open for ratification by all states. Although somewhat distinct from IHRL, regional systems of human rights law, complete with their own enforcement mechanisms, have developed parallel to IHRL. Within the African system, where child soldiering is of particular concern, the African Charter on the Rights and Welfare of the Child ('African Children's Charter') has been adopted.[64] This was the first instrument to lift the minimum age for use and recruitment to eighteen, it provides,

> States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.[65]

The African Children's Charter mandated the creation of a treaty body, the African Committee of Experts on the Rights and Welfare of the Child,[66] and more importantly, the African Court of Human and Peoples' Rights ('African Court') has subject-matter jurisdiction in respect of the prohibition of the use and recruitment of child soldiers. Moreover, the Rome Statute criminalises, in the context of international armed conflict, 'conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to

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[63] 'Report on the Third Session' Committee on the Rights of the Child CRC/C/16 (5 March 1993) par 176 together with Annex VI par 176 and Annex VII.
[64] African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24 9/49 (entered into force 29 November 1999).
[65] *Id* art 22(2).
[66] *Id* art 32.

participate actively in hostilities';[67] and, in the context of non-international armed conflict, 'conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities'.[68] Indeed, in the International Criminal Court's first judgment – the *Lubanga* case – the only charge was the criminal enlistment, conscription, and use of child soldiers.[69]

Plotting the nature of the prohibition of the use and recruitment of child soldiers is very difficult. Schabas has concluded that it is a 'hybrid' norm, properly falling within both IHL and IHRL.[70] Nevertheless, the use of children during armed conflict is often deemed to be an issue more properly belonging to the IHL regime. The fact that an IHL instrument prohibited the use and recruitment of children under thirteen, before an IHRL instrument did so, may well be illustrative in this regard.

Assume that a child rights NGO is following developments in an African state in which armed conflict is imminent. The primary non-state group opposing the government, and who is supported by a neighboring state, is continually recruiting children aged between twelve and fifteen into its ranks. So, too, is a second non-state group, which is aligned to and supported by the government. The situation is becoming more volatile, with isolated skirmishes, but does not yet amount to an armed conflict. Over time the situation deteriorates further until an armed conflict eventually exists. As the governmental forces are losing ground in fighting a well-financed, trained and equipped opponent, they too begin recruiting children.

Throughout these events, the relevant child rights NGO reassess what it can do to secure the rights of the recruited children, and bring those responsible for this wrong to justice. The relevant state within which these events occurred is a state party to the following instruments: AP I; the CRC; the Rome Statute; the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure;[71] the African Charter on the Rights and Welfare of the Child; and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples'

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[67] Article 8(2)(b)(xxvi) of the Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90.
[68] *Id* art 8(2)(e)(vii).
[69] *Prosecutor v Lubanga* case ICC-01/04-01/06 Trial Chamber I 14 March 2012.
[70] Schabas n 53 above at 42.
[71] Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (2011). This instrument is yet to enter into force, nevertheless, for present purposes it is assumed to have entered into force.

Rights.[72] However, the state has not ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.[73]

As a point of departure the NGO assesses what it can feasibly do within the international law framework before the incident deteriorated into an armed conflict. As IHL does not apply outside of conflict, the NGO will have to resort to IHRL norms. In this regard the state is under an obligation not to recruit children younger than fifteen by virtue of the CRC. Moreover, the state may not recruit children younger than eighteen by virtue of the African Children's Charter. However, at this stage it is the two non-state actors who are recruiting children, and IHRL obligations do not bind such non-state entities. Nevertheless, both the CRC and the African Children's Charter, provide that states party must take effective measure to prevent such recruitment by non-state entities.[74] As the state is politically and militarily (although there is no armed conflict yet) opposed to the one non-state group, from a practical perspective there may be very little that the state can do to induce compliance by this non-state group. However, the same does not hold true for the non-state group aligned to the government. As such, by virtue of the CRC Communications Protocol, the NGO can transmit a communication to the Committee on the Rights of the Child. Moreover, the NGO can approach the African Court directly,[75] and the African Court has subject-matter jurisdiction over 'any ... relevant Human Rights instrument ratified by the States concerned' which certainly includes the African Children's Charter, and may well also include the CRC (the African Court is yet to interpret this provision).

These same norms and mechanisms remain relevant once the situation deteriorates into armed conflict. However, once this happens, the state itself will be in an even weaker position in as far as enforcement of its IHRL obligations on the non-state entity with whom it is engaged in armed conflict is concerned. As such, in this instance the NGO will have at its disposal the child soldier prohibitive norm in AP I. This is an international armed conflict

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[72] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 9 June 1998 OAU Doc OAU/LEG/EXP /AFCHPR/PROT (III).

[73] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (entered into force 12 February 2002) 2173 UNTS 222.

[74] Article 4 of the Convention on the Rights of the Child n 56 above; art 1(1) of the African Children's Charter n 64 above.

[75] As the state in question made the relevant declaration under art 34(6) of the African Court Protocol, and the child rights NGO has observer status before the African Commission on Human and Peoples' Rights, as such, in terms of art 5(3) of the Protocol, the NGO has direct access to the African Court.

by virtue of the involvement of the neighbouring state which is supplying, equipping and training the belligerent rebel group. This belligerent non-state group is bound by API, and thus incurs obligations in the international sphere. While there is no direct enforcement mechanism for IHL, the NGO can rely on the ICRC and groups such as Geneva Call, to appeal to the non-state group to comply with its obligations in terms of IHL, so as to further its desire to be seen as legitimate.[76] Moreover, as the crime of child soldier use and recruitment in the Rome Statute is founded on IHL, and is characterised as a war crime, members of non-state groups incur individual criminal responsibility for violation in the international sphere.

When addressing child soldiering from an issues-based perspective, and thus drawing on all available resources, child recruitment will be prohibited during times of peace and armed conflict; the use of children will be prohibited during situations of unrest with associated violence that are not armed conflict; non-state armed groups will be prohibited from using or recruiting children by virtue of international law; states will not be able to derogate from their obligations during armed conflict, and finally, a number of judicial and quasi-judicial enforcement mechanisms will be available through which to seek redress and justice. Although it is an extreme example, this case study offers a good illustration of the possibilities which exist when one addresses a problem from an issues-based perspective. It is also worth mentioning that there are three International Labour Organization instruments that also prohibit child soldiers.[77]

5 Conclusion

An issues-based approach implies embracing the expansion and diversification – or fragmentation if you prefer – of international law. Many of the perceived disadvantages of a system that increasingly develops around somewhat isolated semi-autonomous sub-regimes, fall away if one engages with each of these sub-regimes that are relevant to the issue at hand, in such a way so as to create synergy between the norms and regimes in question. The proposed issues-based perspective will not appeal to all lawyers who work on human rights issues. As I acknowledged in the introduction, the work of those who generate greater understanding of complex issues within narrowly defined

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[76]Geneva Call is an NGO that came into existence during 2000 and which is 'dedicated to engaging armed non-State actors ... towards compliance with the norms of international humanitarian law ... and human rights law ...'. See http://www.genevacall.org/about/mission.htm (accessed 1 February 2013).

[77]ILO Forced Labour Convention 29 (entered into force 1 May 1932) 39 UNTS 55; ILO Minimum Age Convention 138 (entered into force 19 June 1976) 1015 UNTS 297; and ILO Worst Forms of Child Labour Convention 182 (entered into force 19 November 2000) 2133 UNTS 161.

parameters, is essential in realising human rights. So too, is the work of those who seek to mobilise the law as a vehicle to achieve social change. To them, I believe, an issues-based approach can be greatly beneficial. Ultimately, this approach is nothing more than a conceptualisation of the way in which existing norms and knowledge can be used more effectively to achieve the goals of the broader human rights movement, as epitomised by the preamble to the Charter of the United Nations,

> we the peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

I have had a long-term professional focus on children and armed conflict. Whenever I am asked what it is I do for a living, as invariably happens, I usually answer that I am a human rights lawyer, only because most people have a better conception of 'human rights lawyer' than of 'humanitarian lawyer'. However, I always feel that the correct answer is 'I am a lawyer who works at alleviating the suffering of children during armed conflict' – this amounts to an issues-based perspective.