CENTRAL EUROPEAN UNIVERSITY

LEGAL STUDIES DEPARTMENT

COMPARATIVE CONSTITUTIONAL LAW PROGRAM

Comparative Analysis of the Right to a Fair Trial under International Human Rights Law and International Humanitarian Law

by Zokirjon Abdusattarov

LL.M. Short Thesis
Course: International Humanitarian Law
Professor: Nsongurua Udombana

List of Abbreviations:

(Additional) Protocol I - Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of International Armed Conflicts.

(Additional) Protocol II - Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts

(Geneva) Convention I – First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field" of 1949

(Geneva) Convention II – Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

(Geneva) Convention III – Third Geneva Convention relative to the Treatment of Prisoners of War"

(Geneva) Convention IV – Fourth Geneva Convention "relative to the Protection of Civilian Persons in Time of War″

American Convention – American Convention on Human Rights

ECtHR – European Court of Human Rights

ICCPR – International Covenant on Civil and Political Rights

Inter-American Court – Inter- American Court on Human Rights

ABSTRACT

This paper represents a comparative study of a right to a fair trial in International Human Rights Law and International Humanitarian Law. It focuses on the scope of application of both International Humanitarian Law and International Human Rights Law instruments. Particularly, the situations, when one or the other body of law cannot guarantee fair trials rights, shall be explored. In International Humanitarian Law, these situations mostly arise due to status of individuals and types of armed conflict, and in International Human Rights Law, these situations evolve due to emergency situations. While talking about these issues, I would like to draw attention where both instruments can co-exist or fill each other as a guarantor of fair trial rights. Also, I want to touch the issue of implementation of both spheres of law. Substance of the right to a fair trial under both fields of law will not be discussed unless it is necessary to illuminate the application of certain right.

INTRODUCTION

> "In a world such as ours, marked by cultural diversity and fragmented into national sovereign units[…], we have not yet reached the day when the consequences of 'merging' or centralization, or even a 'hierarchy' of procedures and mechanisms of human rights protection, at global and regional level, could be foreseen or properly anticipated and assessed. The multiplicity of co-existing mechanisms of human rights protection at international level seems but a reflection of the way historical process of generalization of the protection of the human person on the international level has taken place and developed throughout the years, and of the regulation of the present-day decentralized international society within which those mechanisms are made to operate – the contemporary *jus inter gentes* .There is, however, within this reality, reason for sustained hope; co-existing international mechanisms of human rights protection have, as victim-oriented experiments, complementary to each other, succeeded so far in reinforcing each other throughout the last four decades of accumulated experience in this area"
>
> Antonio Augusto Cancado Trindade (1997)

The Geneva Conventions were adopted at the time when no significant International Human Rights instruments containing fair trial guarantees existed. Though there were some developments at national level, at the international level only the Universal Declaration of Human Rights provided basic fair trial rights, such as, the right to a public trial, the right to all the guarantees necessary for one's defense, and some others. The Geneva Conventions were the first binding international treaties providing, more or less, comprehensive fair trial guarantees which are binding on State Parties. For this reason, the fair trial guarantees contained in the Geneva Conventions can be considered as the first success for International Humanitarian Law and International Human Rights Law.

Despite the fact that fair trial guarantees in International Human Rights Law emerged later, later developments in the sphere have been significant with the adoption of the European Convention on Human Rights in 1950 and the International Covenant on Civil and Political Rights (ICCPR) in 1966. Both treaties contain a comprehensive list of fair trial guarantees. Subsequently human rights monitoring bodies, such as the Human Rights Committee and European Court and Commission on Human Rights have enriched and have smoothened contentious provisions in the treaties.

If one compares the fair trial rights contained in both fields of law (International Humanitarian and International Human Rights Law), it is easy to see extensive overlap between them. They both guarantee the right to an independent and impartial tribunal, the right to an effective defense, the right not to incriminate oneself, the right to be informed of charges amongst other rights . There are of course some rights that both fields of law do not contain. For example, the right to habeas corpus is guaranteed under the ICCPR but it is not guaranteed under the Geneva Conventions. Or under the Geneva Conventions, pre-trial detention will be deducted from the sentence period but the ICCPR doesn't contain such a provision.

Though both International Human Rights Law and International Humanitarian Law establish their main goal as protecting human values, dignity, lives and heath, the main difference comes to light in the scope of application between these two bodies of law. They apply at different times, in different situations, in different places, and to different people, though there are some intersections as well. Also, there are certain contentious situations when both fields of law may not be applicable. The main purpose of this paper is to determine the scope of application of both fields of law with regards to fair trial guarantees in a comparative manner. The situations when these two spheres of law might be inconsistent with each other will be discussed as well.

International Humanitarian Law applies at times of armed conflict. The fair trial guarantee contained in Geneva Convention III is aimed at protecting prisoners of war, while

Geneva Convention IV aims at protecting the civilian population. Moreover, the scope of application is complicated due to the nature of armed conflicts.

On the other hand, though International Human Rights Law applies at all times, it allows suspension of certain fair trial guarantees during emergency situations. As we can see, both fields of law cannot be applicable during certain situations or times.

In addition, there is a considerable difference between international humanitarian law and international human rights with regards to the monitoring bodies and organs which control the implementation. Each of them presents different implementing mechanisms and bodies which monitor the violations of human rights and bring justice.

Also, while the International Human Rights Law instruments are international (in the sense of worldwide), International Human Rights instruments can be regional and international.

As to the structure of the paper, it is divided into two Chapters.

The first Chapter discusses the scope of application of each field of law. *First,* it explores the times and situations when International Humanitarian Law applies, and then it gives the floor to International Human Rights Law. Temporal and situational application of law is done together because time always determines the situation – they are inseparable. Special attention has been drawn to derogation situations of each regional and international human rights instrument. *Second,* whom each fields of law protect will be discussed. It also discusses the individuals protected under International Human Rights Law and International Humanitarian Law separately. Particularly, persons within International Humanitarian Law are discussed under their separate titles. *Third,* geographical scope of application of each body of law is discussed under the same title. This section doesn't separately discuss the territorial scope of application of each body.

The second Chapter deals with implementation measures of each body of law. This Chapter is rather small because the paper lays special focus on the scope of application. The

issue of implementation of each bodies of law is not separately discussed, but is discussed in a merged manner.

Chapter I. Scope of Application

I.1. Scope of Application with regard to Time and Situations

In this Chapter when and in what situations each field of law (International Humanitarian Law and International Human Rights Law) starts and ends to apply will be discussed. These two bodies of law both are oriented to maintain human values; however the time period that they protect these values usually differs, sometimes it may overlap and sometimes it may leave a gap between two bodies of law when certain fair trial guarantees of both fields of law can not provide protection.

Basically, International Human Rights Law applies at all times, whether would it be peace time or armed conflict. However, in situations when a public emergency threatens the life of the nation, certain international human rights, particularly, fair trial guarantees might stop applying until such threat will be overcome. And conditions for allowing such suspensions of human rights may differ depending on the requirements set in the provisions of each international human rights instrument.

On the other hand, International Humanitarian Law cannot be derogated; however, mainly, its application is limited to situations of armed conflict and they do not apply during peace time. Protection provided under International Humanitarian Law also might be different based on the character of an armed conflict (non-international armed conflict or international).

In this connection, it should be noted that a state will have obligation to provide fair trial guarantees only in the event that respective international treaty is duly ratified by this state. No state is obliged to provide rights to its individuals within their jurisdiction unless it has joined the given international treaty, or this obligation derives from customary or other international obligation. Therefore, the discussed fair trial guarantees even if they are non-derogable and applicable at all times might be irrelevant to certain countries which haven't ratified given international treaties. However, the Four Geneva Conventions and the Convention on the Rights of the Child and the ICCPR are almost universally ratified. Moreover, most, but not all, rules of

customary international law are binding on all states. For this reason, fair trial guarantees which are discussed are relevant in most world countries. The only difficulty might arise with respect to Optional Protocols to Geneva Conventions, particularly Protocol II, which are not as widely ratified as the Geneva Conventions of 1949.

I.1.1 International Humanitarian Law

Originally, it is well known that International Humanitarian Law evolved as a body of law which was aimed at regulating conduct of hostilities only between states and alleviating pains and sufferings of those who were affected by inter-state armed conflicts. International Humanitarian Law started applying when an armed conflict started between two or more states and stopped applying after the end of hostilities. Pursuant to Article 2 of the Hague Convention of 1899, the provisions of the annexed Regulations concerning the Laws and Customs of War on Land are binding on the Contracting Parties in case of war, which means, states shall adhere to these regulations only when they are involved in an armed conflict. In addition, if one of the parties involved in an armed conflict has not joined the treaty, the other party has no obligation to follow the provisions of the treaty.

Nevertheless, in terms of scope of application, later developments in the field, namely, certain provisions of the four Geneva Conventions of 12 August 1949 and Additional Protocols to them have encompassed situations beyond actual armed conflict. Article 2 common to the four Geneva Conventions, which states:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. […],

has significantly extended the application of the Conventions through imposing obligation on States Parties to take certain measures as to the implementation of the Conventions even when a State Party has not entered any armed conflict. These measures include training of legal advisors, translation and dissemination of the treaties. Moreover, since the legal systems of States Parties are diverse, in some countries international laws are directly applicable while in some countries

special implementation measures should be taken by a legislative branch in order to apply the provisions of the treaties. Hence, incorporation of provisions of the Conventions into the national legislation, particularly, into a criminal code, might be quite important for the purposes of respecting values protected in international humanitarian law.

Furthermore, Article 5 of Convention I[1] and III[2], Article 6 of Convention IV[3], Article 3 of Protocol I[4] and Article 2 of Protocol II[5] have enlarged the scope of application even more thoroughly via giving protection of humanitarian law for protected persons, who have been deprived of their liberty or have not been repatriated or resettled. In this way, IHL continues to apply to certain situations (previously occupied territories) and certain categories of people (alleged war criminals who have been captured during hostilities, internees and prisoners of war) even after the declaration of the end of hostilities. Of course, it is very debatable to define the exact time of the factual end of hostilities as armed attacks might freeze for some time and start again or small scale armed attacks might occur on a daily basis[6]. Discussion on the contentious points of the end of hostilities is beyond the scope of this paper[7]. What is most important for this paper is the application of International Humanitarian Law after the end of armed conflict together with full application of International Human Rights Law, which might have been restricted during armed conflicts. Certain categories of persons who have been affected by hostilities will enjoy the rights guaranteed by both set of instruments.

[1] "For the protected persons who have fallen into the hands of the enemy, the present Convention shall apply until their final repatriation…." para 1, Article 5, Convention I

[2] " The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation…." para 1, Article 5, Convention III

[3] „ ... Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention." Para 4, Article 6, Convention IV

[4] „… the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release repatriation or re-establishment." sub-para (b), Article 3, Protocol

[5] "… At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty." section 2, Article 2, Protocol II

[6] e.g., the situation in Iraq after the US and its coalitions invasion of 2003

[7] For more discussion, see the Commentaries to the four Geneva Conventions of 1949 and Additional Protocol to them.

Moreover, application of International Humanitarian Law is complicated due to the character of armed conflicts. The Four Geneva Conventions, which were drafted and adopted as a result of atrocities in the Second World War, are mainly concentrated on regulating inter-state armed conflicts:

> […] the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[8]

They also apply to situations when an occupied territory meets no armed resistance. This will ensure the protection of civilians and interned armed forces of enemy belligerent states[9].

However, since 1945 atrocities caused by armed conflicts of non-international character have occurred in larger scale than those resulting from international armed conflicts[10]. And the rules governing armed conflicts of international character are more extensive and more comprehensive than those governing internal armed conflicts. Initially, it was only Article 3 common to the Four Geneva Conventions, which provided minimum threshold of protection to those who have suffered in internal armed conflicts. Later, this article was further developed and supplemented during the Diplomatic Conference of 1974-1977 and incorporated into Additional Protocol II. According to Article 1, Protocol II covers "all armed conflicts which are not covered by Article of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and converted military operations and to implements this Protocol."

[8] Article 2 common to the Four Geneva Conventions of 1949.
[9] See Commentaries to Conventions III and IV of 1949
[10] INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, KOSOVO REPORT: CONFLICT INTERNATIONAL RESPONSE, LESSONS LEARNED 185 (2000) [hereinafter KOSOVO REPORT] : cited in Nsongurua J. Udombana, When Neutralitiy is a Sin: the Darfur Crisis and Crisis of International Humanitarian Intervention in Sudan, Human Rights Quarterly - Volume 27, Number 4, November 2005, p. 1163

Though adoption of Protocol II was an important step in maintaining human values, its application in internal armed conflicts has been, and still is, restricted due to qualification of existing armed tension in the territory of a State Party. A State Party, which is involved in a civil war, would often feel very reluctant to qualify the existing situations as an armed conflict in order to legitimize the use of prohibited means and methods under humanitarian law to fight against rebellions. Section 2, Article 1 of Protocol II provides that internal disturbances and tensions, which do not amount to armed conflict, are beyond the scope of regulation of the Protocol. The question who should decide whether armed tensions, acts of violence, which happened within the territory of a state party, can be regarded as an armed conflict of non-international character or simple spontaneous acts of violence, which can not be considered a civil war, is left unanswered.

Determination of character of an armed conflict or acts of violence becomes important as based only on this determination a set of legal norms to be applied are defined. In the first case, if it is determined as international armed conflicts a wider range of international humanitarian instruments, basically, the Four Geneva Conventions, the Hague Conventions and some other international treaties will become applicable provided that given states are party to these treaties.

In the second case, it is determined that the conflict is by nature a non-international armed conflict, article 3 common to the Four Geneva Conventions and Protocol II will apply. Moreover, in Nicaragua case, the ICJ pointed out that "general principles of humanitarian law include a particular prohibition, accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not." The Court found that dissemination of a manual by the US, which induced the Contra rebels to violate judicial guarantees through targeting judges and police officers, is in violation of International Humanitarian Law and the fact that the actions led by the US could or could not internationalize the conflict is not important: in either case denial of due process rights to the Nicaraguans could be regarded as a violation of International Humanitarian Law under Article 3 common to the

Four Geneva Conventions or Convention IV[11]. In the case that a state, which is involved in an armed conflict (no matter if it is international or internal), is not a party to the Four Geneva Conventions and Additional Protocols to them, it still has to follow customary international law[12] and "certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war" (Corfu Channel, Merits, I.C.J. Reports 1949, p.22; also Nicaragua case, paragraphs 215and 218).

And lastly, in the third and last case, if the acts of violence are qualified as an internal disturbance, evidently, as stipulated in Section 2, Article 1 of Protocol II, International Humanitarian Law will not apply (though some authors argue that minimum degree of humanity must be maintained in all situations) and International Human Rights Law, at least some of its provisions, will be in force. Despite the fact that International Human Rights Law offers better protection of human values, there might be emergency situations when certain rights are restricted, such as a right to fair trial. Or even worse, there might emerge situations so called "shadow-land" between International Human Rights Law and International Humanitarian Law, when neither of the bodies might be found useless. This will be discussed in the chapter devoted to personal application of the law.

There are two main conclusions to be drawn. first, the temporal scope of application of International Humanitarian Law may embrace the time period prior to armed conflict (rules concerning implementation, dissemination of IHL etc.), during armed conflict (main rules of IHL) and post armed conflict (rules concerning the returning of prisoners of war, interned civilians etc.). Second, the situational scope application is also categorized by the nature of the armed conflict into non-international armed conflict and international armed conflict. In addition, based on the nature of the conflict a different set of international humanitarian instruments will

[11] Stephanos Stavros, The Right to a Fair Trial in Emergency Situations, p. 350
[12] For more information see Nuclear Weapons case and Jean-Marie Hencraerts, Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict, International Review of the Red Cross, volume 87 number 857 March 2005

be in force[13]. Basically, protection of individuals during situations of non-international armed conflict is provided by article 3 common to the Four Geneva Conventions and Optional Protocol II. A situation of international armed conflict, including occupation which meets no armed resistance, mainly, is covered by the Geneva Conventions and Optional Protocol I.

It should be noted here that rules of International Humanitarian Law which govern the above situations do not only consist of the above mentioned treaties, but also customary law and other sources (detailed discussion of these sources is outside the scope of the paper).

1.1.2. International Human Rights Law

Unlike International Humanitarian Law, human rights provisions contained in international and regional human rights instruments, such as the International Covenant on Civil and Political Rights[14], European Convention on Human Rights and American Convention on Human Rights apply at all times once these instruments have been duly ratified and ratifications have been submitted by a state. However, some provisions, including certain rights to fair trial, of international human rights treaties (except some international treaties, which will be discussed below) may permit derogations from certain rights in situations of public emergency under strict conditions, while no derogations are allowed from in International Humanitarian Law under any circumstances. These two peculiarities in application with regard to situations complement each other in protection of human dignity, values, lives and health. In order to explain when fair trial guarantees in International Human Rights Law may stop applying, below I will illustrate in a nutshell when derogations from them are allowed, what limits and conditions are put and how international protection mechanisms, particularly, the Human Rights Committee, European Court of Human Rights, Inter-American Court on Human Rights, interpret the provisions related to derogations, in practice. Then I will categorize the fair trial rights under International Human

[13] Though, during both type of armed conflicts fair trial guarantees are provided in similar way as discussed above in Nicaragua case.
[14] ICCPR also provides that three months period should pass after the submission of the deposit. *See* article section 1, Article 49 of the Covenant.

Rights Law with regard to situational and temporal scope of application, to say more appropriately, by its derogablity nature.

a) Derogations under the International Covenant on Civil and Political Rights

Article 4 of the ICCPR provides that the States Parties might derogate from certain rights as long as it meets following conditions:

(1) an emergency situation which threatens the life of the nation exists;

(2) the existence of public emergency is officially proclaimed;

(3) measures taken to derogate from certain provisions of the Covenant (except articles 6, 7, 8(paragraphs 1 and 2), 11, 15, 16 and 18) are to the extent strictly required by the exigencies of the situation;

(4) measures taken to derogate from the Covenant are not inconsistent with their other obligations under international law; and

(5) measures taken to derogate from the Covenant do not discriminate solely on the ground of race, colour, sex, language, religion or social origin.

As we can see, Articles 9 and 14 of the Covenant, which is devoted to protection of fair trial rights, could be derogated under strict conditions described above. However, HRC has commented that "As certain elements of the right to a fair trial under Article 14 are explicitly guaranteed under international humanitarian law during armed conflict, there is no justification for derogation from these guarantees during emergency situations and certain requirements under the ICCPR in relation to criminal proceedings must be respected even during a state of emergency proclaimed under Article 4."[15] The right to fundamental principles of a fair trial, right to *habeas corpus* (judicial review of the lawfulness of a detention) and *amparo* (judicial control of constitutionality of an official act against an individual with his constitutional rights)

[15] Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) at paragraphs 11 and 16

and the right to be presumed innocent[16] are considered as core fair trial rights which can not be restricted under any circumstances. HRC uses a broad interpretation of Article 4 for the sake of protection of other fair trial rights contained in Articles 9 and 14. Under 4(3) of the Covenant, the HRC requires comprehensive information from the respondent government regarding the intensity of the emergency situation and in the case the respondent government fails to furnish enough information, the Committee may not regard the undertaken derogations as legitimate[17]. Also, while the HRC held the view that reservations to particular clauses of Article 14 may be acceptable, it considered that since right to fair trial, as a whole, is regarded as a norm of *jus cogens*, a general reservation to the right to a fair trial would not be.[18]

Since fair trial rights under International Humanitarian Law are non-derogable, attempts to give the same status on this right under International Human Rights Law were made by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Sub-Commission made a proposal to the HRC to consider the issue of drafting an Optional Protocol III in order to give to rights contained in Article 9 and 14 of the Covenant a non-derogable status. However the Committee rejected the proposal based on the following reasons[19]:

- Considering the States Parties reports submitted so far, the Committee is of the view that the States generally acknowledge the right to *habeas corpus* and *amparo* cannot be limited during public emergencies;
- The Committee expresses the concern that adopting an optional protocol runs the risk of planting a conception that states, which are not party to the new optional protocol, can

[16] Alfred de Zayas, The United Nations and the Guarantees of a Fair Trial in the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pp.676-677; also available at http://www.hreoc.gov.au/legal/submissions/national_security.html
[17] Human Rights Committee, 1981 Annual Report to the General Assembly, Annex XII, para. 8.1.-8.3.: cit. Alfred de Zayas, The United Nations and the Guarantees of a Fair Trial in the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pp.672-673
[18] [UN Doc. CCPR/C/21/Rev.1/Add.6 (1994)]
[19] UN Doc.CCPR/C/SR/1314, paragraphs 50-69: Cit. Alfred de Zayas, The United Nations and the Guarantees of a Fair Trial in the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pp.676-677

derogate from all the rights contained in Articles 9 and 14 of the Covenant, even from the rights which are currently considered as non-derogable, such as, right to habeas corpus.

Other considerations and deliberations of the Committee on the issue of derogation from fair trial rights will be discussed in later chapters under the title of the right.

b) Derogations under the American Convention on Human Rights

In order for a State Party to derogate from the obligation(s) under the American Convention on Human Rights (hereafter, the American Convention), Article 27 of the American Convention requires similar conditions to be met in comparison with the conditions set under Article 4 of the ICCPR. One of the few differences is that the American Convention provides non-derogable status to judicial guarantees, which are essential for the protection of the other non-derogable rights.

In connection with the advisory opinion request seeking the interpretation of Article 25(1) and 7(6) of of the Inter-American Commission on Human Rights[20], the Inter-American Court on Human Rights came to the conclusion that "habeas corpus and " amparo " are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society." In reaching its opinion, the Inter-American Court paid attention to the wording and purpose of the provisions and took the view that "the judicial remedies that must be considered to be essential within the meaning of Article 27(2) are those that ordinarily will effectively guarantee the full exercise of the rights and freedoms protected by that provision and whose denial or restriction would endanger their full enjoyment." The Inter-American Court acknowledged that to ensure the protection of different non-derogable rights contained in Article 27(2) different types of judicial guarantees might be "essential". As an example, the Inter-

[20] **Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987).**

American Court stated that judicial guarantees necessary to guarantee the rights that deal with the physical integrity of the human person must of necessity differ from those that seek to protect the right to a name, for example, which is also non-derogable. However, in the Inter-American Court's view, rights to habeas corpus and amparo are always necessary to protect the liberty, physical integrity of man and to prevent disappearance of the detainees.

In its ninth Advisory Opinion of 6 October 1987, the Inter-American Court further developed its opinion and expressed the view that "essential judicial guarantees, not subject to derogation (article 27(2)), include, besides habeas corpus and amparo, any other effective remedy before judges or competent tribunals (article 25(1)), designed to guarantee respect of the rights whose suspension is not permitted by the Convention." And any action which exceeds what is strictly required by the emergency situation is also considered as unlawful by the Court.

c) European Court of Human Rights

Article 15 of the European Convention of Human Rights permits reservations almost under the same conditions as the ICCPR does (except a clause not permitting discriminations). However, in the practice of the European Court of Human Rights, some peculiar application of derogation clause is observed. In *Ireland v. United Kingdom*[21], the European Court stated: "It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) [of the European Convention] leaves those authorities a wide margin of appreciation". However, this does not mean that the European Court does not assess derogation notes submitted by state parties. The European Court checks the reasonableness of the taken

[21] Ireland v. United Kingdom, 18 January 1978, A25 para 207; see also Brannigan and McBride v. United Kingdom, 26 May 1993, A 258-b, at 49 para. 43: Cit.
http://www.amnestyusa.org/international_justice/fair_trials/manual/31.html

measures. In addition, in *Hauschildt*, it found that although the authorities acted according to the law, the law itself is in violation of the European Convention on Human Rights. Here the European Court showed that when the derogation is concerned with the right to fair trial, it does not always give wide discretion to the states.[22]

d) International Human Rights Instruments that do not allow derogation

There are several international treaties, which guarantee some fair trial rights at all times through their non-derogable nature. Though these international human rights instruments do not contain detailed fair trial rights (except the African Charter), their non-derogabile character gives them special importance. They consist of following treaties and fair trial provisions:

- Under African Charter on Human and Peoples' Rights, no derogation from any provision, including, provisions guaranteeing fair trial rights, is allowed despite the fact that a State Party might encounter terrorist attacks, civil wars or other type of emergency situations. A State Party shall always have an obligation to guarantee the liberty and safety of the individuals within its jurisdiction. A public emergency cannot serve as an excuse derogating from its obligations under the treaty. A national emergency does not allow the suspension of any of the rights the government is obliged to secure according to its treaty obligations[23] ;

- Under Article 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, individuals subjected to torture has the right to complain to impartial and competent authorities, which must promptly examine the formers' case. And witnesses are protected against torture and evidences gained under coercion to be considered not valid;

- Under several provisions of the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination, equality of individuals before law and court of law is guaranteed and no derogation is allowed under any circumstances;

[22] Andrew Byrnes , The right to fair trial in international & comparative perspective, 1997

[23] [(74/92), Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1995/96, AHG/207, Annex VIII: cit. at http://www.amnestyusa.org/international_justice/fair_trials/manual/31.html#3

- The Convention on the Rights of the Child also, without suspension at all times, guarantees the fair trial rights of the child taking into account his/her age(sec.2(III), article 40 of the Convention);

Based on the above observation, nature of fair trial guarantees in International Human Rights Law can be theoretically categorized into three types:

(1) non-derogable fair trial rights;

(2) fair trial rights which can be qualified as non-derogable by court;

(3) fair trial rights which can be derogated by the states under certain circumstances.

The first category of rights consists of those rights which are explicitly declared as non-derogable in the ICCPR, Inter-American Convention on Human Rights, European Convention on Human Rights and some other international instruments discussed above. These rights can never be suspended: they apply at all times and under any circumstances. They are applicable during emergency situations, including armed conflicts, and peace times. However, they are all not universally applicable, some of them are contained in regional human rights standards. These rights consist of:

- *prohibition of death penalty on pregnant women and individuals under 18* (Article 6 of the ICCPR, Article 4 of the American Convention);

- *prohibition of retroactivity of criminal laws* (article 15 of the ICCPR, Article 7 of the African Charter, Article 9 of the American Convention);

- *prohibition of imprisonment merely on the ground of inability to fulfill a contractual obligation* (Article 11 of the ICCPR, Article 7 of the American Charter,);

- *freedom from torture and other cruel, inhuman or degrading treatment or punishment.* This freedom is directly related with conditions of detention and types of punishment for a crime. In this way it guarantees fair detention conditions and prohibits certain types of sentences (Article 7

of the ICCPR, Article 3 of the ECHR, Article 5 of the African Charter and Article 16 of the Convention against Torture)

- *a set of fair trial guarantees* contained in the African Charter;

- *a set of fair trial rights guaranteed for the child* in the Convention on the Rights of the Child;

- *equal access of women and men to court* (Article 15 of the CEDAW)

The second category of rights includes those rights whose rank is elevated to non-derogable degree through interpretation of international human rights instruments by competent bodies and their subsequent application in case practice.

- *Right to amparo;*

- *Right to habeas corpus;*

- *Right to be presumed innocent;*

- *Fair trial guarantees which consist part of "core" human rights.*

The third category of rights includes those rights which do not belong to the first and second category, and can be derogated by the states during emergency situations provided that certain conditions prescribed in the respective treaties with respect to the derogations are met. Besides this, the HRC warned about the illegitimacy of derogations of general character and derogations which affect to such extent that right to fair trial as a whole loses its essence. The American Court also noted that derogation from judicial guarantees, which are essential to protect other non-derogable rights, is impermissible.

It is unarguable that fair trial guarantees under International Humanitarian Law are non-derogable. However, there is one paradoxical situation which non-derogable character of the Geneva Conventions and Additional Protocols to them and derogable character of the ICCPR, Inter-American Convention on Human Rights or European Convention on Human Rights may theoretically create. It can be described with the following hypothetical situation. A state, which is a party to both Geneva Conventions and ICCPR, declares an emergency situations due to

terrorist attacks and in order to fight against terrorists, decides to derogate from certain fair trial rights, let's say for the sake of argument, from right to choose one's own counsel, in compliance with Article 4 of the ICCPR. The accused can choose a counsel from the list of counsels provided by the state (Like in Guantanamo Bay where only American lawyers can defend). After a while, this state faces another emergency situations, namely, it get involved in an international armed conflict. And the situation inside the country gets worse: one the one hand terrorists are exploding main administrative buildings, on the other hands an enemy belligerent state is attacking. As the state is involved in an armed conflict, provisions of International Humanitarian Law, particularly right to choose one's own counsel contained in Article 72 of Geneva Convention IV, should start applying. Here two bodies of law create a paradox: certain fair trial guarantees, which were derogated due to terrorist attacks in the beginning, should be maintained again when the situation worsened due to the armed conflict.

In summary, fair trial guarantees under international humanitarian law apply during armed conflicts without derogations; fair trial guarantees under international human rights law apply during peace time and, in parallel with international humanitarian law, during armed conflicts, either fully or in a restricted manner. They apply in full context with international humanitarian law unless a state, involved in an armed conflict, restricts some of them strictly following the requirements for derogations. However, the rights, which are included in the first and second category above, will always be in force together with International Humanitarian Law during armed conflicts. As it was once rightly observed: **"**If it were not for the corroborating evidence provided by a different but connected branch of international law, humanitarian law, it could well be argued that a minimum floor of due process acceptable to all States parties does not exist."[24]

[24] Stephanos Stavros, "The Right to a Fair Trial in Emergency Situations", p. 348

And the last situation, when the fair trial rights are less protective, is internal disturbances and tensions. In these situations, International Humanitarian Law is not applicable and fair trial rights under International Human Rights Law might be restricted.

I.2. Scope of Application with regards to the individuals and protected rights

One of the unique features of International Humanitarian law is that it treats individuals differently depending on their status while in the case of International Human Rights Law people are the same and they are equal before court of law, discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status[25]. It is mostly because International Humanitarian Law principally developed to protect civilians and hors de combat from the atrocities of enemy belligerent states[26]; on the other hand, International Human Rights Law has developed as a relation between a state and its citizens, where the state is a key guarantor in providing and protecting human rights of its own citizens or the individuals within its jurisdiction. As below categorization of persons is done with regard to providing fair trial guarantees, it might be different and involve smaller fraction of persons than that International Human Rights Law and International Humanitarian Law actually cover. Also, it doesn't attempt to identify every contentious status zone of persons.

I.2.1. Guaranteeing Fair Trial Rights from International Humanitarian Law Perspective

Individuals, who are involved in an armed conflict, or who are somehow affected by it, or find themselves in Occupied Territories, depending on their status and the nature of the armed conflict whether international or internal, enjoy various levels or types of protection under the Geneva Conventions of 1949 and Additional Protocol I of 1977.

First, the Geneva Conventions of 1949 and Additional Protocol I of 1977 distinguish combatants from civilians in international armed conflicts. Then they make distinction among combatants themselves. Combatants are divided into lawful combatants, who can enjoy the prisoner of war status under the Geneva Conventions and unlawful combatants whose rights under the Geneva Conventions have become very contentious in recent years. Article 4 of

[25] Article 26 of the ICCPR, Article 14 of the European Convention on Human Rights, Article 26 of the American Convention on Human Rights, Article 2 of the African Charter on Human and Peoples' Rights
[26] Marco Sassoli, How Does Law Protect in War?, ICRC, Geneva, 1999, p. 92

Convention III defines the status of prisoners of war, who must be accorded protection of the Convention, including fair trial guarantees. According to this article, prisoners of war, in the sense of Convention III, are persons belonging to one of the categories identified therein, who have fallen into the power of the enemy. It identifies as prisoners of war not only combatants who actively took part in hostilities but also those who have connection or relation to armed forces in one or another way.

Second, difference among civilians is made in Article 4 of Convention IV, which states:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

[…]

Below I will separately discuss who enjoy the status of Prisoners of War and Protected Persons, and their fair trial guarantees under International Humanitarian Law.

a) Prisoners of War under the Geneva Conventions and Additional Protocol I

The basic rule for identifying combatants who are entitled to Prisoners of War status contained in 4 Article of Geneva Convention II, which states:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. […]

Determining the status of the person is important because based on this determination, the rights and guarantees of Geneva Convention III will be provided according to article 5 of the Convention. And in case of doubt as to the status of the person, according to the same article, such person shall enjoy the protection of the Convention till his or her status is identified by a competent court. In Osman v. Prosecutor case, where two Indonesian citizens who exploded the bank in Singapore and claimed the protection of the Geneva Conventions, the House of Lords on appeal from the Federal Court of Malaysia, expressed the view that "a doubt arises within the meaning of article 5 where there is an armed conflict and the accused on capture claim to be members of the armed forces. […] It is wrong to say that the 'doubt' did not arise until counsel claimed the protection of the Convention." Determination of the status of Prisoner of War was/is important since persons who are not considered combatants and taking part in hostilities cannot enjoy the status of prisoners of war. They will be criminally liable for the hostilities they committed. In other words, if a lawful combatant, who is participating in hostilities, kills a soldier, who belongs to an enemy Party to the armed conflict, is not criminally responsible for his/her acts neither before his/her own authorities nor before the enemy party's authorities. He/she will enjoy the protection of the Geneva Conventions. However, if a person, who cannot be considered as a lawful combatant under the Geneva Conventions, kills an enemy soldier, his/her acts are qualified as a murder and will be criminally responsible (except in the case of self-defense).

Articles 43-45 of Additional Protocol I has further extended the status of prisoners of war to "the armed forces of a Party to a conflict consist of all organized armed forces, groups and

units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party" and to "individuals participating in military operations of their own volition, without forming part of the armed forces".[27] Article 46 and 47 of Additional Protocol I respectively excluded spies and mercenaries from status of prisoners of war.

b) Protected Persons (civilians) under Geneva Convention IV and Additional Protocol I

As already has been mentioned, Article 4 of Geneva Convention IV determines who can be considered as protected persons. This article does not mention persons without citizenship. The Convention doesn't say whether it protects them also or not. However, as there is no provision which excludes those persons from the protection of the convention, in addition, as section 1 of article 4 of the Convention stipulates that the Convention provides protection to those who find themselves in the hands of occupying power or party to the conflict of which they are not nationals, in can be concluded that the Convention provides to persons without citizenship as well, since they are not nationals of any party to the armed conflict.

Moreover, Article 73 of Additional Protocol I provides that stateless persons and refugees "shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse". Furthermore, Additional Protocol I provides special protection for children and women. Article 76 of the Protocol, prohibits pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. Children under the age of 15 will be protected, pursuant to Article 77 of the Protocol, whether or not they are prisoners of war. If their liberty is deprived for reasons related to the armed conflict, they will be detained in separate place from the adults. The Protocol prohibits imposition of the death penalty on children under the age of eighteen.

[27] Commentary on Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949, p. 544

In addition, Article 50 of Additional Protocol I expanded the status of civilians to persons who are not included in Article 4 A (1), (2), (3) and (6) of Geneva Convention III and Article 43 of the present Protocol. This provision was envisaged by Jean S. Pictet in his commentary on Article 4 of Geneva Convention IV, which states:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. ' There is no ' intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution -- not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.

However, this might be inconsistent with other provisions of the Geneva Conventions and Additional Protocol I[28]. Particularly, Article 4 of Geneva Convention IV, which doesn't protect the nationals of neutral and co-belligerent states, is in contradiction with the above statement. For this reason, status of certain categories of persons is left contentious. In any case, minimum fair trial guarantees contained in Article 3 common to the Four Geneva Conventions must be maintained[29].

Unlike in international armed conflicts, in non-international armed conflicts distinction between civilians and combatants, who are not any more taking part in hostilities, is not made. They must be treated in the same way.

Additional Protocol II guarantees fair trial rights even to those who are arrested after the end of armed conflict related to armed conflicts, while the Geneva Conventions and Additional Protocol I do not cover those areas. However, section 6 of article 75 Additional Protocol, which states:

> Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this article until their final release, repatriation or re-establishment, even after the end of the armed conflict.,

[28] For further reading, Supplementary memorandum by Professor Sir Adam Roberts (December 2002), available on http://www.publications.parliament.uk/pa/cm200203/cmselect/cmdfence/93/93ap10.htm#note161
[29] Jean S. Pictet, the Commentary on Geneva Convention IV, pp. 36 and 40

provides protection for all individuals whose liberty was restricted for reasons related to the armed conflict without a requirement as to the time of the restriction of the liberty whether it occurred during armed conflict or after the end of armed conflict. In this way, it extended guaranteeing fair trial rights under Additional Protocol I to restrictions of liberty of the individuals after the end of armed conflicts. This is important because persons who are alleged to have committed war crimes shall have the protection of both International Humanitarian Law and International Human Rights Law after the end of conflict when their case is being heard before national courts or international criminal tribunals, such as International Criminal Tribunal for the Former Yugoslavia and Rwanda, and International Criminal Court.

To sum up, prisoners of war and protected persons in international armed conflicts are both provided with fair trial guarantees. Persons, who cannot enjoy the fair trial rights under Geneva Conventions and Additional Protocol I, are left contentious due to inconsistency within the treaties. And in non-international armed conflict everybody, whether a civilian or combatant who laid down his/her weapon and any more taking part in hostilities, enjoys the fair trial guarantees contained in Article 3 common to the Four Geneva Conventions and Additional Protocol II.

I.2.2. Guaranteeing Fair Trial Rights from International Human Rights Law Perspective

Unlike international humanitarian law instruments, basic international and regional human rights instruments, namely, the International Covenant on Political and Civil Rights, the African Charter on Human and Peoples' Rights, European Convention on Human Rights and American Convention on Human Rights provide fair trial rights to everyone equally. However, there are some international human rights treaties which are focused specific areas of human rights and freedoms, such as children rights and freedom from torture.

Article 37 of the Convention on the Rights of the Child, which states:

States Parties shall ensure that:

(a) […] Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; […],

provides the child extra legal guarantees to realize his/her fair trial guarantees in addition to the other international treaties on human rights. Article 15 of the Convention against Torture prohibits using evidence in judicial proceedings which was obtained through torture.

In this connection it should be noted that both above mentioned international treaties are of such character that do not allow derogations during emergency situations, including armed conflicts. Therefore, they are also applicable in full alongside with International Humanitarian Law during armed conflicts.

In conclusion, fair trial rights under international humanitarian law are guaranteed based on the status of persons and type of the armed conflict (whether it is international or non-international) discussed above. In practice, different interpretation of the provisions of the Geneva Conventions and Additional Protocol I leads to creating type of persons which are not covered by International Humanitarian Law, like in the case of the policy of the US with regard to detainees in Guantanamo Bay. On the other hand, under international human rights law are provided to everyone, without discrimination based on certain criteria, within the jurisdiction of the state.

I.3. Geographical Scope of Application

In Tadic case, the ICTY stated that "Although the Geneva Conventions are silent as to the geographical scope of international armed conflicts, the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities." Considering that the persons detained by a belligerent state could be easily transferred to any part of the territory and be tried there; and considering that the main purpose of the Geneva Conventions and Additional Protocols is to protected individuals affected by an armed conflict, it can be concluded that fair trial guarantees are applicable in the whole territory of the belligerent states. Moreover, there are explicit provisions in the Geneva Conventions about the geographical scope of application. The fair trial guarantees contained in Articles 71-74 of Geneva Convention IV, which are applicable in occupied territories, are made applicable in the national territory of the party to the conflict through Article 126 of Geneva Convention IV.

Sometimes it becomes a question of who should take responsibility over an occupied territory and provide guarantees under International Humanitarian Law. Does the occupying power have the responsibility to stop on-going attacks on civilians which is done by others but not by them? Who has the obligation to bring an investigation in order to protect the victim's rights? Who should provide access to courts? Though it is not an occupied territory, but like in Sudan, Darfur, terrorists or rebellions are killing so many people where the state doesn't care of its citizens. Who should be responsible for the acts that weren't committed by the state but some other non-state actors?

Occupying power might deny having control over the territory; on the other hand, a former authority of the occupied territory might be unable to function because of the occupying power's existence. Both ICTY (in Tadic case) and European Court of Human Rights used the criteria of 'effective overall control' to determine who is responsible for maintaining peace and security. In the Loizidou case, the European Court of Human Rights

found that the Turkish army had an 'effective overall control' of northern Cyprus and this was sufficient to make the Turkish government responsible for maintaining International Humanitarian Law in the occupied territory. However this was not the case for Israel. Israel denied applicability of International Humanitarian Law basing its argument on that West Bank did not have legitimate authority before it occupied though Geneva Conventions do not require as to the legitimacy or existence of the authority. Moreover, Israel denied the applicability of the ICCPR stating that ICCPR is applicable within the territory of the State. However, the Human Rights Committee responded "the Committee stated: Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law."[30] European Court of Human Rights also several times stated the applicability of the European Convention on Human Rights over States Parties beyond the jurisdiction of the States Parties where they have effective control.

In the Prosecutor v. Jean-Paul Akayesu case, the ICTR discusses the geographical scope of application of International Humanitarian Law in non-international armed conflicts. According to the opinion of the Tribunal, common article 3 and Additional Protocol II will be applicable in the whole territory of the State involved in internal conflict. Hence, the fair trial guarantees contained therein will be applicable in the same territory during a non-international armed conflict.

[30] Cited in John Cerone, HUMAN DIGNITY IN THE LINE OF FIRE: THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW DURING ARMED CONFLICT, OCCUPATION, AND PEACE OPERATIONS, Vanderbilt Journal of Transnational Law, November, 2006

In conclusion, fair trial guarantees under both International Human Rights Law and International Human Rights Law are applicable and states have responsibility to provide them within the jurisdiction and beyond their jurisdiction where they have overall effective control providing that they are party to the respective international treaties.

Chapter II. Implementation

Main difference in implementation is that though both bodies of law require states take certain measures as to the implementation of their obligations, in International Humanitarian Law there are no bodies which can monitor the activities and measures taken by states; on the other hand, International Human Rights Law possesses certain controlling mechanisms such as Human Rights Committee, Human Rights Council, and some other regional mechanisms. Though there are organs like International Criminal Court, International Criminal Tribunal for the Former Yugoslavia and Rwanda, they can only gross violations of human rights after major atrocities happened. They cannot check systematically what steps are taken as to the implementation measures of the Geneva Conventions and give subsequent recommendations to the State Parties. There exist certain problems because of this. The State Parties to the Geneva Conventions are not taking enough measures as to the incorporation of the Geneva Conventions into their national legislation. Legal systems of the world countries are diverse, international treaties are directly applicable in some countries, while in some countries special legislative measures should be taken to embody the international treaties in the national legislation. Moreover, in civil law countries human rights violations which are considered as a crime are exclusively those which are classified in penal codes. If certain human rights violations are not included in the penal code, then it is not considered as a crime. Hence, war crimes which are considered as a crime in international law may not be a crime in national criminal law. For example, Article 356 of the Criminal Code of the Russian Federation on the Use of Banned Means and Methods of Warfare, which states:

> 1. Cruel treatment of prisoners of war or civilians, deportation of civilian populations, plunder of national property in occupied territories, and use in a military conflict of means and methods of warfare, banned by an international treaty of the Russian Federation, shall be punishable by deprivation of liberty for a term of up to 20 years.
> 2. Use of weapons of mass destruction, banned by an international treaty of the Russian Federation, shall be punishable by deprivation of liberty for a term of 10 to 20 years.,

is so narrowly construed that the meaning of "cruel treatment of prisoners of war or civilians banned by international treaty of the Russian Federation" is very vague. For example, whether not providing fair trial guarantees in occupied territories will constitute a crime or not, is not clear.

Also there are some penal codes of other Central Asian countries which only make it a crime if the acts violate the methods and means of warfare. Cruel treatment of civilians and prisoners of war is even left out.

The issue of considering violations of humanitarian law becomes more complicated with criminalizing disobeying to the orders of the commander and executing the orders of the commander which is in violation of humanitarian law. These mutually inconsistent provisions of penal codes which make the soldiers equally criminals still exist in penal codes. If there were some international organ like Human Rights Committee, it would be possible to give recommendation to create coherent provisions in penal codes as to the violations of International Humanitarian Law.

Moreover, in practice, realizing fair trial provisions of the Geneva Conventions and Additional Protocols become very difficult due to the large scale atrocities during armed conflicts. According to the recent report of OSCE with regard to trials in the former Yugoslavia, after the end of armed conflicts in the region, 13 000 charges have been against alleged perpetrators. In this case, a state practically lacks resources in order to try these all charges.

On the other hand, communication procedures of the Human Rights Committee with the alleged victims of human rights violations are also considered to be very slow and less effective. It takes several years for the Human Rights Committee to decide whether there was a violation of the ICCPR though the communication might not be so difficult. Sometimes victims die in prisons awaiting the conclusion of the Human Rights Committee. Trial procedures before the ICTY and ICTR or some other tribunals are also long but not because of the slow

communication but because they involve large amount of violations which take years to hear the case.

To sum up, implementation measures of International Humanitarian Law needs certain measures to be taken exclude the inconsistencies in the penal legislation and more thorough incorporation of International Humanitarian Law in penal codes.

CONCLUSION

This paper has represented an overview of the scope of application of International Human Rights Law and International Humanitarian Law with regards to fair trial rights. The observations have showed that the two bodies of law serve as complements to each other at certain situations and times, and at the same time they have a concurrent scope of application.

When a state accuses its citizen of committing a crime and prosecutes him or her, this person faces a great risk of deprivation of liberty or, even worse, deprivation of life. This person might have limited resources and knowledge about the judicial proceedings in order to be able to defend himself or herself from ungrounded criminal charges of the government, which has a strong well-established mechanism of prosecution. During times of emergency, when a state encounters serious terrorist attacks or during times of war, the state will be reluctant to provide fair trial guarantees for the purposes of effective fighting against the public threat. Especially, when this state is prosecuting nationals of an enemy state, it will have a feeling of revenge and it will be ready to trample all human rights and dignity, as occurred during World War II. However, states of the world have acknowledged this serious problem and responded by adopting international rules which help to maintain human dignity and values at all times. Still, states which face terrorist attacks or armed conflicts try to find the gaps through interpreting in different ways and not applying those rules.

From the observations of the paper it can be concluded that:

- International Human Rights Law and International Humanitarian Law instruments both contain fair trial guarantees, which are basically in substance similar to each other;
- International Humanitarian Law protects individuals based on their status differently during armed conflicts, however the substance of the rights with regards to fair trial guarantees for different categories of persons are similar.

- Persons who are not covered under International Humanitarian Law for reasons of different interpretation, should always enjoy the minimum fair trial guarantees contained in common Article 3 and in addition certain core non-derogable rights of International Human Rights Law.
- International Human Rights Law applies to all individuals at all times both within the jurisdiction of the state and beyond its jurisdiction as long as it has an effective control over it.
- Fair trial guarantees under International Human Rights Law can be derogated during emergency situations under strict conditions; however, core fair trial guarantees can never be derogated.

BIBLIOGRAPHY:

Legislation and Official Materials:

- Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987).
- [UN Doc. CCPR/C/21/Rev.1/Add.6 (1994)]
- African Charter on Human and Peoples' Rights
- African Commission Resolution on the Right to Recourse Procedure and Fair Trial
- American Convention on Human Rights
- Basic Principles for the Treatment of Prisoners
- Basic Principles on the Independence of the Judiciary
- Basic Principles on the Role of Lawyers
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention on the Rights of the Child
- European Convention for the Protection of Human Rights and Fundamental Freedoms
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- Geneva Convention relative to the Protection of Civilian Persons in Time of War
- Geneva Convention relative to the Treatment of Prisoners of War
- Geneva Conventions of August 12, 1949
- Guidelines on the Role of Prosecutors
- Human Rights Committee, 1981 Annual Report to the General Assembly, Annex XII U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001)

- INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, KOSOVO REPORT: CONFLICT INTERNATIONAL RESPONSE, LESSONS LEARNED 185 (2000) [hereinafter KOSOVO REPORT] :
- Inter-American Convention on Forced Disappearance of Persons
- Inter-American Convention to Prevent and Punish Torture
- Inter-American Court of Human Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Civil and Political Rights
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty
- Standard Minimum Rules for the Treatment of Prisoners
- Statute of the International Criminal Court
- Statute of the International Criminal Tribunal for Rwanda
- Statute of the International Criminal Tribunal for the former Yugoslavia
- UN Doc.CCPR/C/SR/1314, paragraphs 50-69: Cit. Alfred de Zayas, The United Nations and the Guarantees of a Fair Trial in the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Universal Declaration of Human Rights

Books and articles:

- Andrew Grotrian, Article 6 of the European Convention on Human Rights : the right to a fair trial, Strasbourg : Council of Europe Press, Human rights files ; no. 13, 1994
- David Weissbrodt and Mattias Hallendorff,Travaux préparatoires of the Fair Trial Provisions : articles 8 to 11 of the Universal Declaration of Human Rights, In:Human rights quarterly : a comparative and international journal of the social sciences, philosophy, and law,1999
- David Weissbrodt, The right to a fair trial, Berlin [etc.] : Springer, 1997
- David Weissbrodt,The right to a fair trial under the Universal declaration of human rights and the international covenant on civil and political rights, 2001
- Green, L.C,The international judicial process and the law of armed conflict, In: Revue de droit militaire et de droit de la guerre; vol. 38, 1999
- Jeanine Bucherer, : Inter-American Court of Human Rights judgment on pre-trial detention, trial on civilians by military tribunals, and rights to counsel, public trial, independent tribunal, and judicial review in time of emergency , The American journal of international law, 2001
- Norman Farrell, International humanitarian law and fundamental judicial guarantees/ Annual conference ..., 1998
- Richard Clayton; Hugh Tomlinson, Fair trial rights,Oxford University PressNote: Met lit.opg. en index Overdr. uit: The law of human rights. - 2000

vol. 1, 2000

- William A. Schabas, The Right to a Fair Trial, In: Essays on the Rome Statute of the International Criminal Court, vol. 2, 2004
- Lal Chand Vohrah , Substantive and procedural aspects of international criminal law : the experience of international and national courts/ In: Substantive and procedural aspects of international criminal law : the experience of international and national courts

- Anthony Dworkin , In: New Wars, New Laws? : Applying the Laws of undue process : terrorism trials, military courts and the Mapuche in Southern Chile, 2004
- Antônio Augusto Cançado Trindade, The right to a fair trial under the American convention on human rights/ In: The right to fair trial in international & comparative perspective, 1997
- Christoph Grabenwarter, Les nouvelles menaces contre la paix et la sécurité internationales : journée franco-allemande, 2004
- Christophe Swinarski, The right to fair trial in international & comparative perspective, 1997
- David Weissbrodt and Mattias Hallendorff, Travaux préparatoires of the Fair Trial Provisions : articles 8 to 11 of the Universal Declaration of Human Rights/ Human rights quarterly : a comparative and international journal of the social sciences, philosophy, and law, vol. 21, issue 4, 1999
- David Weissbrodt, Rüdiger Wolfrum, The right to a fair trial, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Berlin [etc.] : Springer, 1997
- David Weissbrodt, The right to a fair trial under the Universal declaration of human rights and the international covenant on civil and political rights, The Hague [etc.], 2001
- Francis Delon, Pre-trial detention and adminitsrative detention: EU-China human rights dialogue : proceedings of the second EU-China Legal Expert Seminar held in Beijing on 19 and 20 October 1998, 2000
- Jean-Hubert Moitry, Right to a fair trial and the European Convention on Human Rights : some remarks on the République de Guinée Case, Journal of international arbitration, vol. 6, 1999
- Jeanine Bucherer, Castillo Petruzzi, Inter-American Court of Human Rights judgment on pre-trial detention, trial on civilians by military tribunals, and rights to counsel, public trial,

independent tribunal, and judicial review in time of emergency, The American journal of international law, vol. 95, issue 1, 2001

- Jordan J. Paust, Judicial power to determine the status and rights of persons detained without trial, Harvard international law journal, vol. 44, issue 2, 2003
- Marco Sassoli, Antoine A. Bouvier, How Does Law Protect in War?, ICRC, Geneva, 1999
- Michael P. Scharf, The Legacy of the Milosevic Trial, 2006
- Nihal Jayawickrama, The right to a fair trial under the international covenant on civil and political rights
- Nsongurua J. Udombana, When Neutralitiy is a Sin: the Darfur Crisis and Crisis of International Humanitarian Intervention in Sudan, Human Rights Quarterly - Volume 27, Number 4, November 2005
- Pieter van Dijk, The right of the accused to a fair trial under international law
- Richard Clayton, Hugh Tomlinson, Fair trial rights
- Robert Kolb, The jurisprudence of the European Court of Human Rights on detention and fair trial in criminal matters, addenda 1999-2000
- Stephanos Stavros, The right to a fair trial in emergency situations
- Stewart Field, Andrew West, Dialogue and the Inquisitorial Tradition : French Defence Lawyers in the Pre-Trial Criminal Process
- Dara Robinson, Due Process and the Right to a fair Trial, 2004
- Tetsuden Kashima, Judgment without trial : Japanese American imprisonment during World War II

Internet websites:

- http://www.amnestyusa.org/international_justice/fair_trials/manual/31.html#3
- http://www.amnestyusa.org/international_justice/fair_trials/manual/31.html
- http://www.hreoc.gov.au/legal/submissions/national_security.html

- http://www.un.org
- http://www.crc.org
- http://www.wikipedia.org

http://www.publications.parliament.uk/pa/cm200203/cmselect/cmdfence/93/93ap10.htm#note161