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Institut International de Droit Humanitaire
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APPLICATION OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW IN AN ARMED CONFLICT

(Workshop, Sanremo, October 4, 2019)

Edited by Bakhtiyar Tuzmukhamedov

Moscow 2020

International and Comparative Law Research Center
and
International Institute of Humanitarian Law

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The Workshop was made possible thanks to efforts invested by Ms. Stefania Baldini and Professor Edoardo Greppi, respectively, the Secretary-General and the President of the International Institute of Humanitarian Law, and by Ms. Evgeniya Kodintseva and Mr. Egor Fedorov, respectively, the Project Coordinator and the Expert on Public International Law at the International and Comparative Law Research Center, as well as by several other staff members of the IIHL and the ICLRC.

Foreword

The workshop on *Application of International Humanitarian Law and International Human Rights Law in an Armed Conflict*, jointly organized by the International and Comparative Law Research Center and the International Institute of Humanitarian Law, was held in Sanremo, Italy, on October 4, 2019.

The purpose of the workshop was to take a closer look at the complex relationship between the two sets of rules, and problems arising in this regard in the situation of an armed conflict, in particular. This issue has repeatedly become the subject of examination in international courts, and the current practice, far from being harmonized, reveals challenges that attempts at their co-application may cause both to the integrity of these rules themselves and to institutions seeking to apply them to armed conflicts and in their aftermath. The issue was discussed in two consecutive panels, of which the first one was devoted to *Interplay between International Humanitarian Law and International Human Rights Law*, and the second one — to the *Application of International Humanitarian Law and International Human Rights Law by International Courts and Tribunals*.

The workshop brought together distinguished experts with academic, diplomatic, military and judicial — national and international — backgrounds, hailing from Canada, China, France, Germany, Italy, Israel, Russia, Switzerland and the United States, as well as the International Committee of the Red Cross. Several participants boasted extensive experience with the United Nations, Organization for Security and Cooperation in Europe, Council of Europe, European Union and other international institutions, as well as with UN and NATO-mandated international military operations.

Following welcoming remarks offered by Prof. Bakhtiyar Tuzmukhamedov, Member of the Council, International Institute of Humanitarian Law, opening addresses were delivered by Lt. Gen. Giorgio Battisti (Ret.), Vice-President, International Institute of Humanitarian Law, and Victoria Manko, General Director, International and Comparative Law Research Center.

Prof. Natalia Sokolova moderated Panel 1 which included Prof. Marco Sassòli, Col. Richard B. Jackson (Ret.), Dr. Cordula Droege,* Maj. Ady Niv (Res.), and Amb. Jean-Paul Laborde.

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* By videoconference from the ICRC Headquarters in Geneva, Switzerland.

*Participants of the Workshop***

Dir. Victoria Manko moderated Panel 2 which included Judge Anatoly Kovler,*** Prof. Wenqi Zhu, Peter M. Kremer, QC, and Dr. Dieter Fleck.

All participants expressed their personal opinions that should not be construed as reflecting views of governments, international organizations or other entities with which they may be affiliated.

Annexed to this collection are the remarks which were delivered by Prof. Tuzmukhamedov at the Conference "The Role of Human Rights Mechanisms in Implementing International Humanitarian Law (Geneva Conventions)", held at the University of Geneva on 14-15 November 2019. The theme of that Conference was of immediate relevance to the discussions at the Sanremo Workshop, as were ideas expressed in those remarks, some of them having been inspired by exchanges that occurred at the Workshop.

** More photos from the Workshop may be found on the website of the ICLRC at: http://www.iclrc.ru/en/events/60

*** Pre-recorded video presentation.

Opening Session

Bakhtiyar Tuzmukhamedov

Welcoming Remarks

I am proud to be affiliated with both institutions which cooperated in putting together this workshop, sitting on advisory boards of two ambitious projects devised and implemented under the auspices of the International and Comparative Law Research Center and being a member of the Council of the International Institute of Humanitarian Law.

It is good to see friends in this room, some new, but most with long history. Thank you all for responding to our call to arms at such an extremely short notice.

While I should leave it to the leadership of the two institutions to present the workshop, rationale behind it, and expected outcome, I'd rather look at this gathering as authors' conference. Dieter Fleck, a friend of almost 25 years, is a master of that method. Several authoritative collections which he edited, including *The Handbook of International Humanitarian Law*, *The Handbook of International Law of Military Operations*, and *The Handbook of the Law of Visiting Forces*, were born out of such meetings. While we do not entertain ambitious intentions of going straight to Oxford University Press with an offer, I believe that the Center has capacity to arrange a publication that could be then offered to law libraries and other interested parties. Please, ponder that proposal as we exchange ideas throughout this day.

With that, allow me to introduce you to leaders of the two co-organizers of this workshop, and panel moderators.

Lieutenant General Giorgio Battisti retired in 2016 from position of Commander of Italian Army Training and Doctrine Command in Rome after 44 years of distinguished service in the Italian Army. He served in command and leadership positions from platoon through Corps and Army Command, including the Cadets' Regiment at the Military Academy, the

"Taurinense" Alpini Brigade and the NATO Rapid Deployable Corps — Italy. Throughout his career General Battisti held multiple command and staff positions in international coalition operations. In particular, he was assigned to the UN mission to Somalia (UNOSOM II) and the NATO-led SFOR in Bosnia and Herzegovina. Furthermore, he served four tours in Afghanistan, the first one being in 2001-2002. During his last combat deployment to Afghanistan in 2013-2014 General Battisti served as Chief of Staff at ISAF Headquarters. A month ago, almost to a day, Giorgio Battisti was elected Vice-President of the Council of the International Institute of Humanitarian Law.

Ms. Victoria Manko has served as the General Director of the International and Comparative Law Research Center since 2018. She joined the Center as an Expert in Public International Law, later becoming Assistant General Director. Prior to that she practiced international law in reputable firms, including *Bryan Cave Leighton Paisner*, providing legal support to major Russian and international corporate clients. Victoria's international expertise includes investor-state dispute settlement reform currently being discussed at UNCITRAL. She has been most instrumental in putting together several major events hosted by the Center that she leads, including the workshop on "Evidence before International Courts and Tribunals" that brought together prominent personalities, including judges, senior staff members from several international jurisdictions, as well as attorneys admitted to practice there, some present here today. Victoria read law at two major schools in Russia, St. Petersburg State and Moscow State Universities, where she earned bachelor's and master's degrees in international law, respectively. Today she will also moderate the Panel on Application of International Humanitarian Law and International Human Rights Law by International Courts and Tribunals

The Panel on Interplay between International Humanitarian Law and International Human Rights Law will be moderated by Professor Natalia Sokolova, who has been Head of Chair of International Law at the Moscow State Law University since 2017. She graduated with honors from the Law School of Irkutsk University in 1993, and since 2004 she has been a professor of international law at the department she now leads. Courses that she teaches include the general course

of international law, international humanitarian law, international human rights law, and international environmental law, the latter with an emphasis on protection of environment from hostile effects of armed conflicts. Apart from being a well-published author, Natalia is a member of the Council of Competition and Award "International Law in 21st Century", which is administered by the International and Comparative Law Research Center. She has been a regular contributor to biennial international conference "Martens Readings on Contemporary International Humanitarian Law" which several of you have attended as panelists, some more than once.

Victoria Manko

Opening Address

I am privileged to address this gathering of experts who agreed to share their views on the various aspects of application of International Humanitarian Law and International Human Rights Law in the context of an armed conflict. While all of you are well aware of the activities and achievements of the International Institute of Humanitarian Law, let me take a few moments to introduce you to the other co-organizer of this Round Table.

The International and Comparative Law Research Center is a non-profit non-governmental organization that conducts research on various issues of international and comparative law. It also offers expert support to the Russian delegations to different international organizations (ISA, UNIDROIT, etc.), takes part in the work of UNCITRAL as an observer. In addition to that, the Center provides a platform for discussion of the most vital and pressing issues within the field, as well as implements educational projects aimed at promotion of the study of international law.

Our Center is a relatively young institution, but learning and implementing best practices of other organizations, which are active in international legal research and practice, help us to grow, develop, and mature. In this light, cooperation with authoritative institutions, such as the International Institute of Humanitarian Law, is a matter of high importance and value for us.

On behalf of the Center, I would like to express our deepest appreciation to:

- the International Institute of Humanitarian Law that had been incredibly supportive of the idea of the Workshop from the outset;
- Prof. Bakhtiyar Tuzmukhamedov for his role in putting together the Workshop;

- all highly respected participants who found time in their busy schedules to take part in the discussion and share their professional opinions;
- and, of course, to all members of the audience, both here in Sanremo and those attending the Workshop online.

The Workshop will address a very interesting, complicated, and relevant issue. In this light, it is always good to have a productive discussion on such important matters among experts from different parts of the world, with different backgrounds, and highly diversified expertise. I am more than happy that together we are making the Workshop a reality.

Giorgio Battisti

The New Approach of International Operation: Legal Norms vs. Military Effectiveness

In the last thirty years the international scenario has profoundly transformed. The nature of armed conflicts has deeply changed, and the concepts of war and peace have become blurred by the changing characteristics of modern warfare.

This has also modified the political and military context of the use of force, and of course, the legal context has changed too. Furthermore, issues such as the enforcement of international humanitarian law and the respect of human rights and human values have acquired a fundamental importance in the international agenda.

The spectrum of international operations has grown increasingly broader and has come to include various dimensions such as conflict prevention, peacekeeping, peace-making, peace-enforcement, peace-building, and humanitarian operations.[1]

These are multi-functional operations (Peace Support Operation for NATO[2]) conducted in support of a UN mandate or at the invitation of a sovereign government involving a plurality of actors, such as military forces, international organizations, diplomatic and humanitarian agencies, and designed to achieve long-term political settlement (restore or maintain peace) or other conditions specified in the mandate.

In this context, the operational environment is characterized by multiple threats (regulars, irregulars, non-state actors, criminals, terrorists, contractors) contesting all domains (Land, Maritime, Air, Cyber) and acting quickly and often simultaneously.

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[1] UN terminology: https://peacekeeping.un.org/en/terminology.

[2] Peace Support Operation: an operation that impartially makes use of diplomatic, civil and military means, normally in pursuit of United Nations Charter purposes and principles, to restore or maintain peace (AAP-06 Ed. 2013).

Normally, the operations are conducted in crowded urban areas, among population.

The wide range of actors increase the pressure at political and military level and the Media strong influence can amplify, from local to global, the events, influencing the legitimacy of military operations in the eyes of the International Community. Legitimacy rests on the respect of the proper legal framework. This means that Rules of Engagement (RoE)[3] never should permit the use of force in ways that would violate the set of human rights laws.

It is vital to make sure that Soldiers operating in areas affected by an armed conflict or a crisis stay well within the riverbed of both international and customary legislation — above all, the Geneva Conventions.

On the other hand, decisions to use the military force are never made solely on the basis of legal considerations. Political and moral considerations are also involved in such decisions, and they play a central role for their legitimacy.

The media, moreover, can limit space and time in which military forces carry out operations on the ground: the higher the level of legitimacy, the higher the freedom of maneuver of the troops.

The transnational terrorism represents one of the main threats: terrorist groups are operating at different levels, within or outside state-armed conflicts and include youth and street gangs, criminal groups and organized crime as well as highly professionalized terrorist groups such as Al-Qaeda, Daesh, Boko Haram, Al Shabab, or militia providing community security.

They are linked with a world-wide network of autonomous groups able to conduct complex attacks, asymmetric actions and indiscriminate actions of opportunity.

Today the military plays a different role from the past. Soldiers no longer operate against someone but rather in support or in favor of the local civilian population, within the context of complex local realities, to contain violence, to prevent hostile militias from entering urban areas, to protect

[3] RoE define the circumstances, conditions, degree and way force may be applied.

people and their resources, to satisfy bare necessities and, finally, to provide security to allow local institutions to consolidate government's authority.

Operations in Afghanistan, Syria and Iraq confirmed that the *Center of Gravity* is always represented by the civilian population. Indeed, without popular support (or at least its neutrality) it becomes impossible to achieve control of the territory as a pre-requisite for country reconstruction.

Consequently, avoiding civilian casualties is a key concern in each operation!

In his book, British General Sir Rupert Smith highlighted how the majority of modern conflicts are all about winning local population support where the confrontation is held:

> […] "*winning the trial of strength will not deliver the will of the people, and at base that is the only true aim of any use of force in our modern conflicts*." […][4]

Such a statement is so true that it has coined the term "human territory" to give a greater emphasis to this idea.

Western societies have become more attentive and demanding in the application of already established national/international rules as well as in the development of other rules aimed to contain collateral damages and to limit sufferance (killings of civilians and casualties among the troops could cause public opinion antagonism toward military operations at home).

The use of an inappropriate level of force can generate undesired negative effects. Such effects could be exploited by opponents as an evidence of the brutality of regular forces, reinforcing insurgency, creating martyrs and strengthening recruitments.

On the other hand, contemporary operations are more ambitious than in the past (monitoring of ceasefires and observation of fragile peace

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[4] *The* u*tility of Force*, Penguin Books, London 2006, p. 331. Sir General Rupert Smith commanded the UK Armoured Division during the first Gulf War in 1990-91; He commanded the UN forces in Bosnia in 1995; He was General Officer in Charge (GOC) in Northern Ireland in 1996-99 and served as Deputy Supreme Allied Commander (DSACEUR) in NATO. He retired in 2002.

settlements), and they are supposed to achieve more than simply preventing the resumption or spread of an armed conflict.

It is a long-term process of creating the necessary conditions for sustainable peace aimed to reduce the risk of (re)lapsing into conflict by strengthening national capacities at all levels (measures that effect the functioning of society and the Nation).

In this light, the multifaceted nature of the operations highlights how important it is to develop a coherent set of rules of law that cover the complexity of military activities.

In such an environment, the question of the applicability of International Humanitarian Law (IHL) and Human Rights Law (HRL) becomes acute. This is particularly the case when the units are involved in peace-enforcement (combat) operations.

Nations have a responsibility to educate and train their forces to respect the international humanitarian law, and other international conventions and treaties which may affect military operations. Of course, this presents some challenges: each Nation retains its full sovereignty, including on choosing to adhere or not to adhere to conventions or treaties.

Troop Contributing Nations (TCN) personnel should respect the laws, the culture and traditions of the Country in which they are deployed, in accordance with the specific UN mandate under which they operate.

Current operational context, characterized by a variegated threat and renewed types of conflict, requires soldiers to be at the same time *peace-keepers* and *warriors* and renew the centrality of the human values even at the beginning of the third millennium. This is all the more evident when, for example, high intensity operations and peacekeeping operations are carried out simultaneously, with no notice or premonitory signs. This might require to:

- conduct combat actions against enemy formations in order to oppose terrorist activities;
- ensure safety and freedom of movement for territory control;
- perform humanitarian activity in support of the population.

Men and women must be trained, they should have a good cultural level and commanders at lower levels have to be capable to make the right decisions on the field in a short time.

The decision taken by a young corporal does not influence only the patrol activity or the perception of the locals, but it can also affect and change the entire situational picture. Nowadays, such effect gets a bigger resonance than in the past, due to the amplifying power of mass media.

To underline such aspect, the term *strategic corporal* has been created inside the US environment in order to highlight the need to ensure that the young leaders get an adequate preparation, certainly higher than the one their colleagues employed in previous operations had.

The obvious challenges of respecting international humanitarian law and human rights in actual operations are no excuse to ignore them. On the contrary, they must lead to an even greater effort to factor these considerations into operational reality.

In my opinion, as a seasoned soldier, this is a very important topic because, at the end of the day, the last elements of this process are the young soldiers and tactical commanders in the field, who must correctly apply the guidelines, Standing Operating Procedures and directives.

These norms, in my experience, must be clear, understandable and applicable for them, offering guidance on how to interpret and apply the various conventions to military operations.

In other words, those who develop international law must keep in mind the need to reduce as much as possible the gap between the law (theory) as it is written and its implementation on the field (practice).

In addition, operations today are characterized by the recurrent involvement of the armed forces in the detention & transfer of individuals. One of the main challenges faced by forces dealing with detention is to ensure that they meet their international obligations — stemming from IHL and HRL — when handling detainees. These obligations include rules applying to the transfer of detainees to local authorities or to other TCN.

This is one of the major challenges and, without doubt, one of the most inevitable consequences of contemporary military operations. Individuals

may be detained for various reasons, but — except for the detention for criminal proceedings — they are most commonly detained for reasons related to security.

Inevitably, the taking and handling of detainees during military operations is increasingly subjected to political, media and judicial scrutiny.

The so-called *detention operations* may be characterized by different situations, whether we refer to International Armed Conflicts (IAC)[5] or Non-International Armed Conflicts (NIAC)[6].

While the situation is relatively clear in IAC (captured soldiers are entitled to POW-status), there is little agreement on the rules that apply to detention in NIAC.[7]

This is not only a problem for the detainees, but it also affects military operations.

Detention is a necessity when conducting warfare: otherwise the only options would be the release of captured enemies, or, which sadly occurs all too frequently in contemporary conflicts, killing them.

The legally most difficult thing is the decision to detain an individual, review his detention and ultimately release or transfer him. This aspect of detention is national responsibility also within the multinational legal framework; and the methodology of the decision-making process and its criteria will be determined by the detaining Nation.

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[5] International Armed Conflict (IAC) occurs when there is any conflict between two states. Neither the duration of the hostilities, the intensity of any fighting, nor the number of wounded or killed affects its characterization as an armed conflict.

[6] Non-International Armed Conflicts (NIAC) present a more complex identification paradigm than international armed conflicts. In general, non-international armed conflicts involve protracted armed violence between a government and organized armed groups, or between two or more such groups.

[7] The borderline between International and Non-International Armed conflicts is not as clear-cut as was once thought and is complicated further by the use of force mandated by the United Nations and the complex mixed and transnational nature of certain non-international armed conflicts.

These include, in particular, an important set of procedural safeguards for administrative detention as well as the *principle of non-refoulment*.[8]

Detention is often a necessary task in multinational operations to ensure that the force can carry out its mandate, act in self-defense and protect the local population.

In both Iraq and Afghanistan battlefields, the placement of hard-core jihadist prisoners with everyday, common prisoners have been a mistake and allow for a more instructed radicalization program to develop within the limits of the prison.

Failure to recognize the importance of detention operations and facilities would *de facto* enhance extremism, recidivism, and potentially allow radicalized detainees to form new networks such as Daesh.

If inappropriately used, detention can lead to mistreatment of the local population and loss of international and national support for the multinational force, as well as criminal and disciplinary charges against those who have mistreated detainees.

Experience has demonstrated that we must consider what type of detainee the military has in custody: is the detainee a simple peasant that has just done something stupid, or a fully radicalized insurgent leader, or a person caught while transporting weapons for his local tribe?

It can also result in claims being brought against the governments that comprise the multinational force regarding their responsibility for the breach of human rights and/or IHL norms.

Even if there is a growing awareness of what is right and wrong in the context of armed conflicts, we must consider that — on the field — the same rules may have a diverse interpretation due to the different cultural background of military forces, national interests and, above all, the priority task of each commander: to protect his soldiers!

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[8] The *principle of non-refoulment* prohibits a State from transferring a person to another State if there are substantial grounds for believing that he or she runs a risk of being subjected to violations of his or her fundamental rights — notably torture, other forms of ill-treatment, persecution or arbitrary deprivation of life. "International Humanitarian Law, Human Rights and Peace Operation", p. 34, 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, 4-6 September 2008.

Panel 1: Interplay between International Humanitarian Law and International Human Rights Law

Natalia Sokolova

For quite some time there has been an on-going scholarly debate on the issues of international protection of individuals in an armed conflict in the context of the relation between IHL and HRL. No matter how complicated the theoretical constructions are, the reality turns out to be even more ambiguous.

Human rights must be ensured in times of peace and in times of armed conflict. If human rights are violated and individuals seek to protect them in international human rights bodies, it is important to take into account the conditions or circumstances of enforcement of their rights in situations of the armed conflict when assessing the obligations of States to promote, for example, the right to life or the right to personal integrity.

Effective and practicable protection of rights in times of armed conflict requires particular circumstances be taken into account, including striking the right balance between IHL and HRL and finding proper ways and modes of applicability of HRL rules in the environment of an armed conflict.

It is sometimes argued that international human rights treaties should be applied in the context of both international and non-international armed conflicts. However, due regard must be given to the principal role of IHL rules in the armed conflict.

One more problem arises here. Respect for human rights is one of the basic principles of international law that binds all actors capable of exercising authority in a certain territory, including non-state actors.

States apply IHL provisions as a threshold to limit human rights in armed conflict, for example, by prohibiting arbitrary deprivation of life in armed conflict.

Panel 1 (left to right): Richard Bruce Jackson, Ady Niv, Jean-Paul Laborde, Marco Sassòli, Natalia Sokolova

International customs also play a special role as a source of international law. However, the question of whether the rules of a particular human rights treaty are applicable in a situation of armed conflict and to what extent, if this is not expressly stated, has not got any unambiguous answer.

The peculiarities of the conditions of armed conflict require an assessment of the circumstances and obligations aimed to ensure, for example, the principle of proportionality or the adoption of precautionary measures under IHL. The compliance with IHL should mean or be interpreted in the context of the absence of any violation under HRL.

Much contemplation over interaction and relationship between IHL and IHRL should not, as I think, obscure the fact that IHL and IHRL provide for different legal regimes within which the relevant relations are regulated but which nevertheless overlap.

To date, the scientific literature, as well as the practice of States and international organizations, has demonstrated the use of different approaches

to describing the relationship between international humanitarian law and international human rights law.

The questions of how to distinguish between situations where either international humanitarian law or international human rights law should be applied, or both, how the rules of these branches should be applied together and, finally, how to resolve conflicts that arise are still open.

But today's discussion, I think, will shed light on, at least, some issues.

When it comes to situations of armed conflict, IHL provisions must not simply be taken into account but applied effectively and comprehensively.

There are absolute prohibitions, such as the prohibition of torture. They are expressly prohibited by both HRL and IHL. But there is another situation. Thus, the right to life is protected both in peacetime and in situations of armed conflict, but, given the scope of obligations under HRL and IHL, this not necessarily serves as the basis for competition in the fulfillment of States' obligations to ensure this right.

The debate, also involving the general issues of the IHL-HRL relationship, will continue. The practice of international human rights bodies would fuel and encourage further discussion.

Marco Sassòli

The Interplay between International Humanitarian Law (IHL) and International Human Rights Law (IHRL)

International Humanitarian Law (IHL) and International Human Rights Law (IHRL) share the same aim of protecting the life and dignity of human beings, but they are also marked by many differences with respect to the history, sources, and structure of each. The interplay between these two bodies of law is symbolically and conceptually important, and in some instances it matters for their respective application in practice. With that being said, for the victims of armed conflict the interplay between these two disciplines is not as important. The actual problem in many armed conflicts today is not that the wrong branch is applied, but that the rules of both IHL and IHRL are not sufficiently respected. In the aftermath of armed conflicts, there have also been some instances of misapplication of the rules of both branches in adjudicative bodies.

There are important differences between IHL of international armed conflicts — which is the starting point for any comparison with IHRL — and International Human Rights Law generally. First, the origin and history of the two disciplines are different. Before IHL was officially codified into law through various international treaties starting in the 19th century, codes of conduct that governed warfare already existed in ancient texts such as the Code of Hammurabi, the Bible and the Koran. IHRL as *international* law in contrast was conceived after World War II in recognition of the need to protect the rights of citizens from infringement by their respective States. Furthermore, the structure of the two branches also differs, because IHRL accounts for the subjective individual rights of people against States. Meanwhile, IHL consists of objective rules of behaviour for States and armed groups and requires compliance by such groups as well. In addition, IHL applies universally through a few binding treaties to situations of armed conflict, while Human Rights are protected by a great variety of instruments, including regional treaties and, most importantly, mainly by domestic law. IHL protective rules make distinctions between international armed conflicts (IAC) and non-international armed conflicts (NIACs), between civilians and combatants, and between a party's own territory and

occupied territory. In contrast, the basic idea of IHRL is that all human beings have the same human rights.

The very concept of international *humanitarian* law appears to be misleading, because it gives the impression that this body of law is "humanitarian" in nature. IHRL, however, is arguably more "humanitarian" than IHL, given the broad protection of individuals that it provides under its universal and regional instruments. However, IHL is perhaps more realistic for situations of armed conflict, as the law is directly on point.

Before dealing with the interplay between IHL and IHRL, it is necessary to clarify when each discipline applies. Only when both apply, any issue of interplay or even contradictions may arise. IHL is only applicable in armed conflicts. Historically however, many States have denied that an armed conflict has ever occurred, in favour of instead suggesting that IHRL is the only legal regime that should be applicable. Therefore, it is imperative that these States be reminded that denial of the applicability of IHL cannot absolve them from the obligation to respect its rules. By the same token, IHRL is in effect at all times, during peacetime and armed conflicts on the territory of a State. The main controversy with respect to IHRL is whether and to what extent this body of law applies extraterritorially, i.e. whether individuals have rights vis-à-vis State action that occurs outside of a State's territory. Furthermore, derogations are permitted from most rules of IHRL in a situation, such as an armed conflict, that threatens the life of the nation, which is not the case under IHL. IHRL instruments contain derogation clauses that permit an exemption of States from abiding by certain human rights norms outside of the 'core' human rights, which comprise the right to life in addition to the prohibition of torture, slavery and the application of retroactive criminal laws. To be admissible, derogations must, furthermore, be necessary and proportionate, and they may not be inconsistent with the derogating State's other international obligations, including its obligations under IHL. IHL, therefore, constitutes in armed conflicts the minimum threshold below which human rights derogations may not extend.

When both legal regimes apply during an armed conflict, they typically lead to the same result, but divergences between these two disciplines do exist. Before discussing contradictions between the two branches, it has first to be clarified what constitutes a contradiction. A contradiction certainly

exists when one branch prescribes certain conduct, while the other branch of law prohibits that same conduct.[1] The singular example of this sort of contradiction is found in the Fourth Geneva Convention, which requires an occupying power to try civilian inhabitants of an occupied territory *only* before a military court.[2] Under IHRL, at least according to the European Court of Human Rights, civilians may not be brought before a military court.[3] Beyond this clear contradiction between the legal paradigms, there are also other discrepancies between what IHL admits (but does not require) and what IHRL prohibits. One example relates to the possibility of interning Prisoners of War (POWs) without any judicial control to determine the legality of such internment. This is based on the rationale that POWs are considered a part of the military potential of the enemy forces. Under IHL, there is no obligation to accord information relating to the legal basis and procedure to a POW. In contrast, IHRL prohibits detention of any individual without the possibility of judicial control regardless of that person's status.[4] Therefore there is a contradiction in this described context caused by overlapping IHL and IHRL norms that should be resolved by holding that IHL constitutes the *lex specialis*, because the situation takes place in an armed conflict, and IHL has more specific rules, deliberately adapted to this context.

The principle of *lex specialis* provides an avenue of how to solve discrepancies between the two branches. It expresses the idea that a more specialized rule prevails over a more general rule. The majority opinion in the legal community agrees that IHL and IHRL discrepancies must be resolved under the principle of *lex specialis*, but there is no consensus as to what that means. Personally, I reject the idea that *lex specialis* principle means that IHL always prevails in armed conflict situations,

[1] Such a restrictive understanding of contradictions between IHL and IHRL has been adopted in European Court of Human Rights, Grand Chamber, Judgement, *Al-Jedda v. the United Kingdom* (Application no. 27021/08), 7 July 2011, para. 107.

[2] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art 66.

[3] European Court of Human Rights, *Cyprus v. Turkey* (Application no. 25781/94), Judgment of 10 May 2001, paras. 358-9.

[4] International Covenant on Civil and Political Rights, Art. 9(3); European Convention on Human Rights, Art. 5(4); American Convention on Human Rights, Art. 7(5).

including when IHL is silent on an issue. According to the International Law Commission and its *Report on Fragmentation*, the notion of *lex specialis* is considered a relationship between two norms as it relates to certain facts.[5] Thus, if IHL is more pertinent to the facts of the case, then IHL prevails, and if it is rather Human Rights Law that is more specific, then the relevant Human Rights rule prevails. IHL will tend to prevail over IHRL in IACs, because the IHL legal framework governing those situations is very developed through detailed rules of treaty law, mainly consisting of the Geneva Conventions.

In my view however, it is possible for both IHL and IHRL to constitute the *lex specialis*. On certain issues, IHRL can be considered as the *lex specialis* in armed conflict, when it relates to rights such as the freedom of the press, which are not accounted for under IHL.

An alternative perspective involves the growing tendency to reject the very idea of *lex specialis*, in favour of speaking about systemic integration. This simply means that scholars solve possible contradictions by taking into account other applicable rules of international law,[6] here both branches, IHL and IHRL, in light of each other. The European Court of Human Rights' judgment in the *Hassan* case supports this idea, because it "accommodated" the six exhaustively enumerated reasons justifying a deprivation of liberty in Article 5 of the European Convention on Human Rights with the more permissive rules of IHL of IACs.[7] In my view, it is not possible to add through mere interpretation a seventh admissible reason to an exhaustive list, so the Court should have instead solved this problem by admitting that the relevant IHL provisions constitute the applicable *lex specialis*.[8] Admittedly however, systemic integration most often leads to the same outcome instead of letting one area of the law prevail over the other under the *lex specialis* principle.

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[5] For the ILC, *see* ILC, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" (Report of the Study Group of the ILC finalized by Martti Koskenniemi, 2006) UN Doc A/CN.4/L.682, paras. 104-5.

[6] *See* Art. 31(3)(c) of the Vienna Convention on the Law of Treaties.

[7] European Court of Human Rights, Grand Chamber, *Hassan v. the United Kingdom* (Application no. 29750/09), Judgement, 16 September 2014, para. 104.

[8] *Ibid*, paras. 99-103.

Whether one explanation is more credible than the other depends also on the applicable instruments. For instance, when considering the International Covenant on Civil and Political Rights and the prohibition of arbitrary deprivation of liberty,[9] I think it is logical to resort to systemic integration in order to interpret the term "arbitrary" in an armed conflict situation, taking IHL into account. In contrary, if we have, for instance, in the European Convention on Human Rights, an exhaustive list of reasons for which a person can be deprived of liberty,[10] then it is not clear how we can add another reason through systemic integration, such as the interpretation of one branch in light of the other branch. Therefore, here, *lex specialis* is the correct explanation on this point.

The question of how IHL and IHRL interplay is of particular practical importance in the context of NIACs in relation to the issues of killing and detention. Underlying the debate is, first, that the prevailing opinion holds that we can make and should make as many analogies as possible between IHL of IACs and of NIACs in cases where no rule in treaties applicable to NIACs exists. Is such an IHL rule applied by mere analogy the *lex specialis* prevailing over the applicable IHRL treaty rule? One may obviously object that solutions to most problems not regulated by treaties in NIACs are not found by analogy, but in customary law. However, in my view, there is no *lex specialis* between two customary rules. Customary IHL of NIACs and customary IHRL in NIACs do not exist separately. To determine customary law for a given situation, one should analyse State practice and *opinio juris* in past situations as similar as possible to the situation at hand. So only one rule of customary law applicable to a certain problem can exist (and therefore no *lex specialis* determination is necessary).

The second important issue is whether IHL provides for "authorizations," which is a question of practical importance only due to IHRL, because the latter requires a legal basis to limit human rights, e.g. to detain someone. Therefore, the question arises whether IHL can offer the legal basis required by IHRL? This is the case with respect to the legal basis of detention in an IAC. Generally speaking, IHL can offer the necessary legal basis under IHRL in an IAC, but in a NIAC, it does not: simply because IHL of NIACs

[9] International Covenant on Civil and Political Rights, Art. 9(1).
[10] European Convention on Human Rights, Art. 5(1).

does not contain any explicit rule on the admissibility of any deprivation of liberty. As a point of clarification, this does not mean that it is unlawful to detain enemies in a NIAC. Under IHL, it is certainly lawful, but the IHL rule itself does not offer a sufficient legal basis under IHRL. With that being said, this remark also does not determine whether IHRL or IHL prevails on this issue — and if IHL prevailed, no legal basis would possibly be required.

Additionally, it is important to discuss the implementation of IHL by IHRL mechanisms. The International Committee of the Red Cross (ICRC) acts as the main implementing mechanism of IHL, and it invokes and implements IHRL on occasion when IHRL constitutes the *lex specialis*. It is important to note that it is not a judicial body to which one can appeal to in order to have one's rights recognized. IHRL mechanisms in contrast are routinely asked to implement IHL, because individuals do not have a judicial mechanism or other remedy under IHL to address their concerns. Therefore, litigants essentially translate their alleged IHL violations into IHRL violations in order to gain access to a legal remedy through an international adjudicative forum.

Furthermore, some Human Rights bodies have an explicit mandate to apply IHL, for instance, the United Nations Human Rights Council in its Universal Periodic Review and the Committee on the Rights of the Child. Another entry point of IHL involves State derogations from human rights treaties, which requires among other conditions, that the derogation is compatible with the other international obligations of the State. Therefore, the human rights body is required to verify whether the derogation is compatible with IHL, a universal obligation that all States share by virtue of ratifying the Geneva Conventions. Another possibility is to interpret IHRL in light of IHL if there is an armed conflict. Relating back to the example of detention, specifically whether it is arbitrary, an IHRL mechanism would have to consider any detention complying with the IHL requirements not to be arbitrary under IHRL. Alternatively, one could also argue that a human rights body has to take the *lex specialis* into account, and then to apply the *lex specialis*, even if it is IHL, because finally a human rights court or committee should not find a State in violation of its obligations, if the State did what it should do under international law. In my view, this is not a question of jurisdiction, but a question of substance. If IHL constitutes the *lex specialis*, then it must prevail even before a human rights mechanism.

There are some risks associated with a Human Rights body applying IHL, because these types of bodies sometimes neglect the specificities of IHL and armed conflict. The first risk, as demonstrated in various judicial decisions of these bodies, is simply that they do not completely understand IHL, and as a result, they misapply it. Beyond this point, there is a fundamental difference in philosophy between IHL and IHRL that influences how IHL is applied in the IHRL bodies. Anecdotally, I informally spoke about targeted killings recently with a very eminent Human Rights specialist, in the Office of the High Commissioner for Human Rights. I explained that under IHL, targeted (i.e. discriminate) killings are one of the compliance goals, compared to indiscriminate killings that are prohibited. The Human Rights specialist was, nevertheless, understandably from her point of view, shocked by the very idea of targeted killings. This is the exact sentiment of most practitioners of IHRL, in contrast to those who mainly practice IHL, where killing persons who are legitimate targets is permitted. All in all, there are numerous philosophical differences that have led and continue to lead to the misapplication of IHL in IHRL bodies.

What is more, there is a risk that even when IHRL mechanisms apply IHL, they do so with a human rights approach, which may lead to unrealistic solutions. Unrealistic rules, however, do not protect anyone, and in addition undermine the credibility of international law. For instance, the European Court of Human Rights stated in *Al Jaloud* case, that there must be an inquiry after the death of an individual, and in the inquiry, the family must be involved to safeguard the victim's interest.[11] The typical military response to this ruling is to say that it is virtually impossible to conduct such an inquiry, let alone involve family members of the victims, for example, when bombing an enemy-controlled town. Similarly, to require a full *habeas corpus* procedure in many situations of arrests in armed conflicts is an unattainable goal, because it is unrealistic to require soldiers to stop fighting during a conflict to instead conduct an inquiry or testify in front of a court. Without their enquiry and testimony, however, there will simply be a lack of evidence before the *habeas corpus* judge, and the arrested person will be released. Not all soldiers have the capacity of the Italian Carabinieri,

[11] European Court of Human Rights, Grand Chamber, *Jaloud v. the Netherlands* (Application no. 47708/08), Judgment, 20 November 2014, paras. 157-228.

or the French Gendarmerie, who are accustomed to carry out domestic policing duties. For example, filling in a form as soon as a soldier arrests someone is not a task that a soldier can functionally do on a battlefield. To always require full *habeas corpus* guarantees in an armed conflict is an unrealistic IHRL requirement that has been impressed upon the field of IHL by IHRL practitioners. It cannot be valid for people arrested in the midst of the fighting, as opposed to someone who is arrested in her home who should be entitled to full *habeas corpus* guarantees, even in an armed conflict. So again, it very much depends on the situation.

In conclusion, there are many instances where IHL and IHRL differ, but to insist on additional convergences would lead to unrealistic rules that would be difficult to implement in practice. It is very important that we do not give the soldiers a lecture on *lex specialis*, and on how this concept is interpreted by different scholars, but clear instructions. Furthermore, IHRL and IHL practitioners alike, including judges, should receive more training and education on both IHL and IHRL and their interplay so that they are able to determine the proper conduct in various situations on the ground and in adjudicative bodies. This solution would likely prevent the misapplication of each body of law and increase respect for the rules of each discipline.

Richard B. Jackson

IHL (LOAC) and IHRL (Human Rights): How Do They Interact?

What is the debate? It is not so much a conflict of laws discussion, "Which body of law applies?" Instead, it is a question of how the two bodies of law are complementary and how they interact differently for different states, depending on their treaty obligations, the issue, where they are in an armed conflict, and their interpretation of the law.

The U.S. Department of Defense Law of War Manual describes the relationship between these two bodies of law in the following way: "The law of war is the controlling body of law in armed conflict."[1] In order to articulate and demonstrate an approach to the relationship the Law of War Manual (LOWM) describes, this article will use the *lex generalis* of human rights law on detention to analyze how the *lex specialis* of the law of armed conflict is the starting point for detention in armed conflict for US forces [this approach is also reflected in the Copenhagen Standards adopted by many multinational forces]. Over time, the detention standards for military detainees held by the U.S. have transitioned to a human rights-based approach, reflecting a restoration of the "law of peace", human rights or domestic law.

Key Concepts

In order to understand the relationship between these two bodies of law, it is important to understand some key concepts from these bodies of law and international law, in general. Some of the differences between these bodies of law are based on the object and subject of the treaties: IHL, or the Law of Armed Conflict (LOAC), is focused on the conduct of states during warfare and the victims of conflict [principally wounded and sick, shipwrecked, detainees and civilians]; IHRL, at least initially, was focused on the relationship between the state and its citizens. Any difficulty

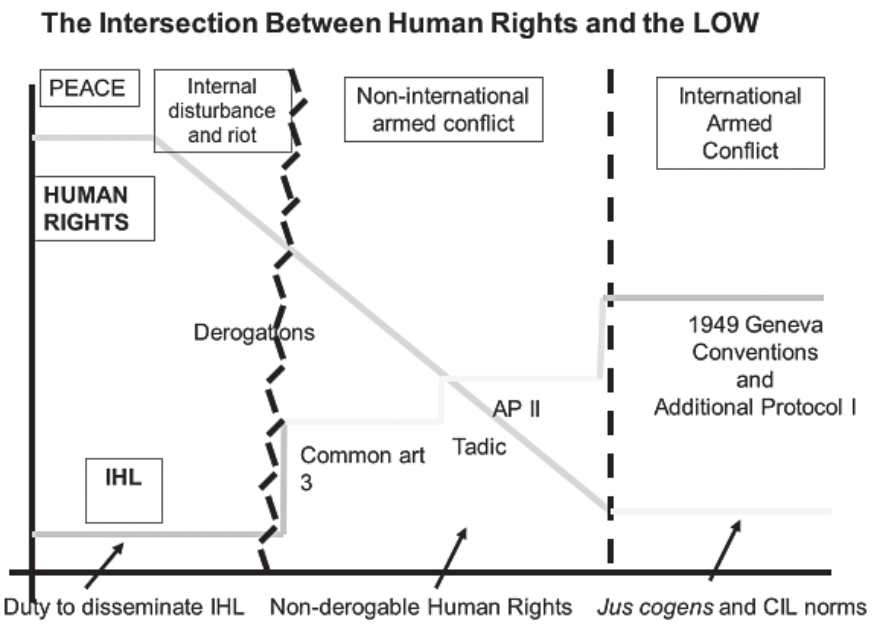
[1] U.S. Department of Defense, Law of War Manual (June 2015, updated Dec 2016), paras.1.3.2. (*hereinafter* DoD LOWM).

in interpretation and definition of the relationship between these bodies of law is based on more recent efforts (including judicial interpretation of treaties) to extend the domain of IHRL into armed conflict.

The Law of Armed Conflict (LOAC) provides an extensive corpus of treaty-based law in international armed conflicts; it provides a paucity of guidance for non-international, or internal armed conflicts, however. And the application of the available treaty law is dependent upon the provisions of the treaty that activate, or trigger, the application of the law. International human rights law (IHRL), which developed after much of the LOAC, is dependent upon the treaty activation provisions of its constituent treaties and how it is incorporated into domestic law; for many states involved in armed conflicts, including my own, the complementarity of IHRL is also dependent upon whether the treaties are applied extra-territorially. The territorial state in an internal armed conflict must also factor in its ability (or need) to derogate from certain provisions of IHRL, which have been incorporated into its domestic law, in situations that threaten the life of the state. For both bodies of law, customary international law may help fill in gaps created by treaty activation, or jurisdictional provisions. Both branches of the law developed partly as a reaction to the horrors of World War II; this is reflected in the almost simultaneous adoption of the Universal Declaration of Human Rights[2] (an aspirational document that has led to more definitive and binding treaties over time) and the four Geneva Conventions of 1949.[3] There is also a remarkable complementarity, or even congruity, of the key precepts of IHRL reflected in customary international law and provisions of human rights law incorporated into the LOAC. While the complementarity is evident between these two complementary bodies

[2] Universal Declaration of Human Rights, G.A. Res 217A (III), U.N. Doc. A/810 at 71 (1948) (*hereinafter* UDHR).

[3] (Geneva) Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 [*hereinafter* GC I]; (Geneva) Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S.3363, 75 U.N.T.S. 85 [*hereinafter* GC II]; (Geneva) Convention (III) Relative to the Treatment of Prisoners of War, Aug 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [*hereinafter* GC III]; (Geneva) Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [*hereinafter* GC IV].



of law, the relationship between the two areas of law is also dependent upon a theory of *lex specialis*, which allows the two sets of international law to interact and acts as an interpretive canon to demonstrate how they interact.

The slide inserted below is an attempt to describe, graphically, the relationship; it is an illustration borrowed from an International Committee of the Red Cross presentation I attended several years ago. I will explain how I view the interaction of these two bodies of law by defining the terms listed on the slide and then proposing an approach [the *lex specialis* approach] suggested by the International Court of Justice in several cases as an interpretive canon in relating the available law in a complementary fashion.

Law of Armed Conflict

The Law of Armed Conflict [also known as the Law of War or International Humanitarian Law][4] is "triggered" differently, depending

[4] *See* DoD LOWM, para.1.3.1.2.

on the character of the conflict. The most comprehensive body of law has been developed to regulate conflicts between states, or international armed conflict (IAC).[5] The law for international armed conflicts is applied to "all cases of declared war or … any other armed conflict which may arise between two or more [states], even if the state of war is not recognized by one of them … and all cases of partial or total occupation … even if the said occupation meets with no armed resistance."[6] As depicted in the right third of the graph, this is an extensive body of law, regulating the conduct of hostilities and protections of the victims of armed conflict.[7] The regulation of hostilities in international armed conflict is contained in the Hague Regulations and summarized in AP I, with some additional guidance and illumination provided in the Certain Conventional Weapons Convention (CCW) and the Hague Cultural Property Convention; the latter two treaties, which apply in international and non-international armed conflicts, have restated much of what has become customary international law from the Hague Regulations and AP I.[8] The victims of armed conflict are protected,

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[5] *See, e.g.*, Common Article 2, 1949 Geneva Conventions, cited above.

[6] *Ibid.*

[7] Along with the four Geneva Conventions at Note 3, *supra*, these laws and regulations are contained in the following treaties, among others: (Hague) Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S.539, 1 Bevans 631; (Hague) Regulations Respecting the Laws and Customs of War on Land, Annex to Hague IV (*hereinafter* Hague Regulations); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in 16 I.L.M.1391 (1977) (signed by the United States Dec. 12, 1977, but not transmitted to the U.S. Senate; *see* S. Treaty Doc. No. 100-2) [*hereinafter* AP I]; Protocol Additional (III) to the Geneva Conventions of 12 August 1949, relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, S. Treaty Doc. No. 109-10, 45 I.L.M.558 (2006); (Hague) Convention for the Protection of Cultural Property in the Event of Armed Conflict, with Regulations of the Execution of the Convention, May 14, 1954, S. Treaty Doc. No. 106-1, 249 U.N.T.S. 240 [*hereinafter* Hague Cultural Property Convention]; Convention on Prohibitions of Restrictions of the Use of Certain Conventional Weapons which have been Deemed to be Excessively Injurious of to Have Indiscriminate Effects, Oct. 10, 1980, S. Treaty Doc. No. 103-25, 1342 U.N.T.S. 137, 19 I.L.M. 1524 [*hereinafter* Certain Conventional Weapons Convention, or CCW].

[8] It is important to understand the current practice for the conduct of hostilities in international armed conflict, the majority of which has become customary international law; for the U.S., this is particularly important in analyzing the provisions

and armed forces are regulated (regarding their treatment) in international armed conflict by the extensive provisions of the four Geneva Conventions and portions of AP I. For example, these provisions are so detailed that they provide a model for medical care (GC I and II) and housing for displaced persons and prisoners of war in conflicts between states (GC IV and III, respectively).

Non-international armed conflicts, or civil wars, are conflicts "occurring in the territory of [a state]."[9] Non-international armed conflicts are subject to some customary international law, but there is much less treaty law applicable under the law of armed conflict for such conflicts. While the CCW and the Hague Cultural Property Conventions provide some guidance for the regulation of hostilities and the protection of cultural property in non-international armed conflict, the main provisions of LOAC treaties that apply are terse and incomplete, and are dependent upon legal triggering mechanisms that are designed to protect state sovereignty within their territory. Common Article 3 to the Geneva Conventions contains a general exhortation to "humane treatment" for those who are no longer "actively participating in hostilities", along with a list of prohibitions that are consistent with "municipal laws" that civilized states "respect daily, even with respect to its own criminals", according to Jean Pictet, of the International Committee of the Red Cross, who wrote the first commentary on the conventions.[10] Pictet also provided a list of considerations for

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of AP I, since the U.S. has not yet ratified AP I. The DoD LOWM restates many of the provisions of AP I as customary law, or as a result of incorporation into the CCW; *see, e.g.*, DoD LOWM § 1.8 and footnotes in Chapter V ("Conduct of Hostilities"). *See also* Henckaerts/Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules (Cambridge University Press, 2005) (*hereinafter* ICRC CIL Study); the U.S. has expressed reservations on this document with regard to its methodology and many conclusions in John B. Bellinger III, Legal Advisor, Department of State, & William J. Haynes II, General Counsel Department of Defense, *Letter to Dr. Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study*, Nov. 3, 2006, reprinted in 46 I.L.M. 514 (2007) (*hereinafter* U.S. Response to ICRC CIHL Study).

[9] Common Article 3, 1949 Geneva Conventions, cited above (*hereinafter* CA3).

[10] Jean Pictet, Commentary on GC I, at 50. This point by Pictet sets up a straightforward comparison of provisions subsequently adopted in International Human Rights Law regarding the standards adopted for states in treatment of their own citizens.

applying CA3 to internal conflicts, while reassuring states that even this low bar of LOAC contact will not apply during "mere acts of banditry or during a short-lived insurrection."[11] Subsequent jurisprudence, beginning with the seminal *Tadic* case from the Tribunal for the Former Yugoslavia, has summarized the criteria for application of CA3 using two requirements — a certain level of hostilities, and the degree of organization of the parties.[12] Application of the *Tadic* standard has been much more difficult in practice, however; and states rarely admit to "internationalization" of an internal conflict, largely to exploit the ambiguity and avoid responsibility for their conduct.[13]

Additional Protocol II provides more extensive provisions to apply to non-international armed conflicts; these provisions include medical treatment, some guidance on the treatment of detainees, and additional guidance on targeting and the treatment of civilians.[14] AP II, however, has a more extensive set of specific criteria to trigger the application of the LOAC to an internal conflict; these include the same discriminator mentioned by Pictet ("not applying the protocol to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts"), as well as specific requirements of the opposing party in a non-international armed conflict (NIAC): the opposing party [consisting of dissident armed forces or other organized armed groups] must be "under responsible command" and "exercise control over territory", sufficient to conduct "sustained and concerted military operations" and implement the LOAC, including AP II.[15] Even though many of these provisions were suggested by Pictet in the

[11] *Ibid.* Pictet listed the following considerations: organization of the opposing party and control of territory, recourse to military force by the state, recognition of belligerents by the state or the UN, and insurgent authority exercised like a government.

[12] See *Prosecutor v. Tadic*, ICTY Appeals Chamber IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96-127 (2 Oct 1995)

[13] *See, e.g.*, Laurie Blank & Geoff Corn, "Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition", 46 *Vanderbilt Transnational Law Journal* 3 (May 2013).

[14] Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in 16 I.L.M. 1391 (1977) (*hereinafter* AP II).

[15] Art. 1, AP II.

application of CA3, this higher bar to activation of AP II has resulted in very few states actually applying AP II in internal conflicts, or NIACs.[16] Many states, and the ICRC, have referred to customary international law, the basic principles of LOAC, or policy to fill in the gap created by a lack of formal application of NIAC law.[17]

Human Rights Law

International Human Rights Law began as an effort to convince states to adopt certain minimum standards of conduct toward their citizens. Even the Universal Declaration on Human Rights, which was a non-binding resolution of the General Assembly (or aspirational in nature), urged member states "to secure … universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction".[18] States that have ratified the International Covenant on Civil and Political Rights, the primary IHRL treaty applied by most states, through their domestic law, are obligated to apply these rights "to all individuals within its territory and subject to its jurisdiction".[19] Most states apply the ICCPR via domestic legislation, as it is not viewed as a "self-executing" treaty;[20] states also apply the ICCPR to their domestic law subject to RUD's — reservations, understandings and declarations.[21] The eventual application of IHRL within a given state can be

[16] In transmitting AP II to the Senate for ratification, the U.S. maintained that it intends to apply AP II provisions in all non-international armed conflicts covered by CA3. CCW and the Hague Cultural Property Conventions also apply much of the AP II [and some AP I] provisions to the conduct of hostilities. Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, Concluded at Geneva on June 10, 1977, Treaty Doc. 100-2 (1987).

[17] *See, e.g.*, DoD LOWM, para. 17.2. *See also* ICRC CIL Study.

[18] Preamble, UDHR.

[19] Art. 2(1), International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (*hereinafter* ICCPR).

[20] See, e.g., *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act*, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 6, 7, 10, 12, 24(1).

[21] For a description of RUD's, *see* Vienna Convention on the Law of Treaties, N. Doc. /a/ CONF39/27 (1969), reprinted in 63 Am. J. Int'l L. 875 (1969), 8 I.L.M. 679 (1969).

very different, based on these methods of application of the relevant treaties. In addition, states are often obligated by different regional human rights treaties.[22] Finally, territorial states may derogate from certain provisions of the ICCPR (like Article 9 on detention provisions) in times of national emergency;[23] states have applied derogation provisions very differently, depending on whether they are dealing with law enforcement challenges, like widespread terrorist acts or demonstrations, or if they are engaged in officially declared non-international armed conflicts.[24]

The extra-territorial application of human rights law has been a subject of dispute in legal writing and international jurisprudence.[25] The U.S. argued that the legislative history of the ICCPR, going back to the leadership of Eleanor Roosevelt in developing the treaty, indicates that the jurisdiction provision applying the treaty to "individuals within [the state's] territory **and** subject to its jurisdiction" (emphasis added) was intended to apply to states, its citizens, and within its territory.[26] Other states have also adopted

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For example, U.S. RUD's include statements that align the U.S. understanding of terms within the ICCPR with the U.S. Constitution, explaining that the U.S. Constitution, as interpreted by the laws and jurisprudence of the United States, is the primary document for establishing the content and means of interpretation of these rights. Islamic states, like Qatar for example, may interpret the provisions of the ICCPR by, with and through Islamic Sharia law. *See* UNTC Depository of the ICCPR, *available at*: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec.

[22] *See, e.g.*, European Convention on Human Rights, Rome, 4 November 1950, *available at*: https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[23] Art. 4, ICCPR.

[24] *See* Emilie Hafner-Burton, Laurence Helfer, & Christopher Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, International Organization 65, Fall 2011, 673, at 675, *available at*: https://pdfs.semanticscholar.org/4ee4/ee04dd28faa5044256ad28b157f225ad5c74.pdf.

[25] *See, generally*, Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflicts*, in International Humanitarian Law and International Human Rights Law 201- 213 (Orna Ben-Naftali ed., 2011).

[26] *See* Michael Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 Am. J. Int'l L. 119, 141 (2005). *See also* U.N. Human Rights Committee, Summary Record of the 1405th Meeting, U.N. Doc CCPR/C/SR 1405 6-7, ¶20 (Apr. 24, 1995) ("The Covenant was not regarded as

this approach of non-extraterritorial application of human rights treaties; Canada, for example, has maintained that its Charter of Rights and Freedoms (implementing the ICCPR) does not have extra-territorial effect in applying to detainees in Afghanistan.[27] But the European Court of Human Rights has applied the European Convention on Human Rights, based on a different articulation of its jurisdictional provision to the same activity (detention by the UK in Iraq); the rationale was that the UK forces exercised "authority and control" over individuals held in detention or killed by security forces.[28]

The human rights law that applies across the threshold of non-international armed conflict is, therefore, difficult to determine, sometimes. States may not have declared that they are in an armed conflict, nor may they have derogated from specific provisions of IHRL. Even worse, states may be ignoring application of human rights law, because they do not believe they will be held accountable within either the domestic or the international human rights regime.[29] There is some agreement, however, regarding the broad parameters of customary international human rights law. As indicated above, the basic prohibitions against extra-judicial killings or torture (for example) are exactly the same as the customary human rights law.[30] Some authors have suggested that customary international human rights law may be applied in a complementary fashion to determine the baseline requirements of IHRL;[31] it would also serve as a basis of comparison with the applicable law of armed conflict provision.

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having extraterritorial application."). *Compare* Mary McLeod, Acting Legal Advisor, Department of State, *Opening Statement at 53rd Session of the U.N. Committee Against Torture, Nov. 3-28, 2014,* Nov. 12, 2014 ("In brief, we understand that where the text of the Convention provides that obligations apply to a State Party in 'any territory under its jurisdiction'…extend to certain areas beyond the sovereign territory of the State Party, and more specifically to 'all places that the State Party controls as governmental authority'." [Like Guantanamo Naval Station and registered ships and aircraft])

[27] *Amnesty International Canada v. Canada (Chief of the Defense Staff)*, 2008 FC 336 (2008) 4 FCR 546, ¶¶ 10-11.

[28] *Case of Al-Skeini and Others v. The United Kingdom*, ECtHR, 55721/07, ¶149 (Jul. 7, 2011).

[29] *See* Corn & Blank, *supra* note 13.

[30] Mary McLeod, at note 26, *supra*, also emphasized this interaction between IHL and IHRL.

[31] *See* Ken Watkin, Fighting at the Legal Boundaries, Oxford University Press (2016), pp. 151-155.

Lex Specialis

ICJ jurisprudence has indicated that "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".[32] In a situation where both are applicable, *lex specialis* can be employed to describe the relationship between the two bodies of law. The theory of *lex specialis* can be viewed as a displacement theory, where human rights law is replaced by the law of armed conflict during armed conflict, or it can be viewed as an interpretive canon to describe a more complementary relationship between the two bodies of law.[33] The U.S. DoD LOWM asserts that the "law of war is the *lex specialis* during situations of armed conflict, and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims".[34] In illustrating this point, this section of the DoD LOWM notes that detention provisions of the ICCPR do not "affect a State's authority (to detain) under the law of war", indicating a potential displacement approach.[35] But the section goes on to note that several international courts or commissions have "interpreted the rights conveyed by human rights treaties in light of the rules of the law of war, as the applicable *lex specialis*".[36]

An illustration of the latter *lex specialis* approach (as an interpretive canon) is offered regarding the law of targeting in the Advisory Opinion on Nuclear Weapons of the International Court of Justice.[37] The ICJ applies customary human rights law, "the right not to be arbitrarily deprived of one's right to life", to hostilities, as the *lex generalis*; but the "test of what is an arbitrary deprivation of life … falls to be determined by the applicable *lex specialis*, namely, the law applicable to armed conflict, which is designed

[32] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, ICJ. ¶¶ 105-106, 177-178. Although the U.S. DoD LOWM does not cite this case, it acknowledges the general concept at para. 1.6.3.1.

[33] The former approach has also been termed an "exclusionary approach." Watkin, note 31, *supra*, at 124.

[34] DoD LOWM, para.1.6.3.1.

[35] *Ibid*.

[36] *Ibid*, FN 93.

[37] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ, 226.

to regulate the conduct of hostilities".[38] In that way, the main law of war principles of distinction, proportionality, and precautions in the attack are applied to the use of force in an armed conflict. For example, in discussing the targeting provisions applicable to drone strikes in the war on terror, U.S. Attorney General Eric Holder noted that the human rights standard for due process (determining whether the use of force is arbitrary) is satisfied by applying the targeting standards for the use of force in armed conflict.[39] The more specific law of war is applied to interpret what is arbitrary, under the general human rights standard.

The Copenhagen Principles and Guidelines for Handling of Detainees in International Military Operations, established by 24 nations and five international organizations in 2012, also can be seen as illustrating a complementary relationship between IHL and IHRL.[40] If the baseline *lex generalis* is human rights law, including a prohibition on prolonged arbitrary detention,[41] then the individual guidelines can be viewed as illustrating an integration of IHL, or LOAC, customary or treaty rules to provide specificity. The treatment standards, in paragraphs 3 and 9 of the Guidelines adopt the humane treatment standards of CA3 and Article 5 of AP II, for example. And the periodic review standard of paragraph 12, applying to individuals detained for "security reasons", is expressed in the terms used in articles 43 and 78 of GC III, regarding the process due to civilian internees in international armed conflict. Although some of

[38] *Ibid*, at 240.

[39] Josh Gerstein, "Holder: Targeted Killings Legal," Politico, March 5, 2012, *available at*: https://www.politico.com/story/2012/03/holder-targeted-killings-legal-constitutional-073634.

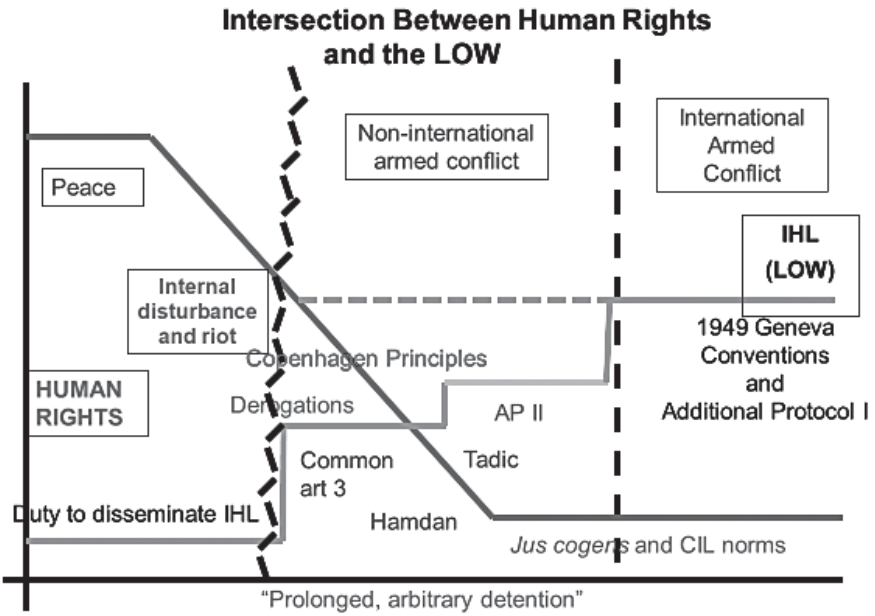
[40] The Copenhagen Process on the Handling of Detainees in International Military Operations, Copenhagen, 19 Oct. 2012 (*hereinafter* Copenhagen), *available at*: http://iihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf. While the commentary relies heavily on human rights standards, the participating states only ratified the principles and guidelines, not the commentary, "while recognizing the challenge of agreeing upon a precise description of the interaction between international human rights law and international humanitarian law." *Ibid*, ¶ V.

[41] A prohibition on prolonged arbitrary detention is recognized by many states as customary international law. *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States, paras. 701-702. *See also* Copenhagen Commentary, ¶ 4.4.

the guidelines are expressed in terms more familiar to human rights law, like the requirement to use only "necessary and appropriate" force against detainees, these guidelines may be applied specifically in terms of LOAC standards, which prohibit "violence to life, health, or physical or mental well-being" of detainees in non-international armed conflict.[42] In general, the Copenhagen Principles provide an excellent illustration, in situations involving detention by non-territorial states in non-international armed conflict, of the application of IHL as the *lex specialis*.

The U.S. Experience with Detention

The following slide is a modified version of the ICRC graph, above, illustrating the interaction between IHL and IHRL in detention operations. I will explain those modifications and the manner in which the interaction between the two bodies of law is demonstrated in recent U.S. experience in Iraq, Afghanistan, and the War on Terror.



[42] Arts. 4&5, AP II.

Application of the Law of War (IHL)

A state that is entering an armed conflict in a third state, either at the request of that state, or in an act of self-defense or collective self-defense under the U.N. Charter, must provide definitive guidance to its armed forces, so that they can apply the most protective and disciplined legal regime to their actions, including conduct of hostilities and the protection of war victims. The U.S. has chosen to apply the law of armed conflict, as a matter of policy, in any armed conflict and all other military operations.[43] For example, in what was clearly an international armed conflict in Iraq, followed by an occupation (applying CA2 and the entire panoply of international armed law), the coalition forces continued to apply the detention provisions of GC IV for civilian internees, even after the conflict had entered a non-international armed conflict phase.[44] Although there has been some criticism of the policy approach to the application of IHL,[45] it is not inconsistent with the *lex specialis* approach, as will be illustrated below.

In the absence of a policy application of IHL, once a conflict enters the non-international conflict phase, it is difficult to define what portion of the law of war applies; and once that dilemma is resolved (through the "triggering application" of CA3 or AP II, discussed above) it provides little substantive law to apply to the conduct of detention. The most extensive guidance in this regard is contained in Articles 4 and 5 of AP II, which describe some minimum humane treatment standards and fundamental guarantees; it is more protective of the victims of non-international armed conflict who are detained to apply provisions of the Civilians Convention (GC IV) [as there are no Prisoners of War in non-international armed conflict]. Application of the international armed conflict LOAC standards

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[43] Department of Defense, directive Number 2311.01E, *DoD Law of War Program*, 9 May 2006, ¶ 4.1. It is illustrated by the yellow line and dotted yellow line extending from international armed conflict into non-international armed conflict on the graph.

[44] *See* Coalition Provisional Authority, Memo Number 3 (Revised), *Criminal Procedure*, 27 June 2004, Section 6.4 (MNF Security Internees pursuant to GC IV).

[45] Watkin, note 31, *supra*, at 127. ("If a state takes the position there is no extraterritorial application of human rights treaty law, this policy-based approach appears to be designed to fill a perceived void in the application of international law. However, such policies cannot be applied as part of the specialized law debate. That debate is about law, not policy.")

also allowed coalition forces to start from a protective set of standards, to build toward a human-rights-based approach as the conflict moved toward a peaceful resolution.

During the Afghan conflict, U.S. forces started with an approach that there was no applicable IHL treaty applicable to the conflict, particularly regarding the detention of al Qaeda members seized on the Afghan battlefield or in neighboring countries; these individuals were to be treated "humanely … consistent with military necessity".[46] Several years later, in 2006, the U.S. Supreme Court reversed the decision of the President Bush and applied CA3, as a minimum standard, to the al Qaeda detainees, classifying the conflict as non-international in character.[47] From the *Hamdan* case in 2006, throughout the conflicts in Afghanistan and Iraq, the U.S. applied CA3, as a minimum yardstick for treatment, processing, and criminal prosecution.[48]

Human Rights Law

For the United States, as explained above, there is no extraterritorial application of the pertinent international human rights treaties, except where there is clear overlap with the law of armed conflict. In *Hamdan*, for example, the Supreme Court applied the "regularly constituted court" provision of CA3 to U.S. domestic law, in order to invalidate the original military commissions order.[49] Prohibitions on torture and cruel treatment from CA3 are also completely consistent with international human rights treaties.[50] And U.S.-recognized customary international human rights

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[46] George W. Bush, Memorandum for [Security Council], Subject*: Humane Treatment of al Qaeda and Taliban Detainee*s, 7 February 2002, ¶ 3. It was this memo that allowed OLC attorney John Yoo and others to construct a justification for harsh interrogation techniques, including water boarding; it essentially created a "no law zone," where neither IHL nor IHRL applied.

[47] *Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2740 (2006), at 618.

[48] For a description of this gradual improvement of detention treatment and processing standards in Afghanistan, *see* Jeff Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, DA Pam 27-50-445, The Army Lawyer, June 2010.

[49] *Hamdan*, note 47 *supra*, at 620.

[50] Mary McLeod, Acting Legal Advisor, Department of State, *Opening Statement at 53d Session of the U.N. Committee Against Torture*, Nov. 3-28, 2014 ("Although the

law provides a list of *jus cogens* prohibitions (like slavery), and other basic standards for treatment.[51] The CIL prohibition against "prolonged arbitrary detention" provides the primary IHRL standard to analyze with the issues related to detention in armed conflict [as depicted at the bottom of the slide, above].[52] The concurrent IHL/IHRL provisions and customary international human rights law provide the *lex generalis* for the analysis of detention.

Prolonged Arbitrary Detention

An illustration can be provided by a comparison of these terms, "prolonged arbitrary detention", in IHL and IHRL. For example, what does "detention" mean in the two separate regimes? Under U.S. criminal procedure law, the domestic manifestation of restraints on liberty under Article 9 of the ICCPR, an individual is detained when he or she is "no longer free to leave" the presence of law enforcement officials.[53] But the detention provisions of IHL are not activated by a stop at a checkpoint [despite the coercive nature of a checkpoint, where the individual is clearly not 'free to leave'], rather detention involves physical custody of individuals who are out of combat, or interned, or detained for reasons related to the conflict.[54] What is "prolonged" detention is defined differently by human rights law and the law of armed conflict: many states have a specific timeframe in mind for law enforcement detention, prior to judicial

law of armed conflict is the controlling body of law with respect to the conduct of hostilities and the protection of war victims, a time of war does not suspend the operation of the Convention Against Torture, which continues to apply, even when a State is engaged in armed conflict. The obligations to prevent torture and cruel, inhuman and degrading treatment and punishment in the Convention remain applicable in times of armed conflict and are reinforced buy complementary provisions in the law of armed conflict.")

[51] Restatement (Third), note 41, *supra*, para. 702.

[52] *Ibid*.

[53] *Orozco v. Texas*, 394 U.S. 324, 89 S. Ct. 1095 (1969) ("According to the officer's testimony, petitioner was under arrest and not free to leave when he was questioned in his bedroom in the early hours of the morning.")

[54] *See, e.g.*, Art. 5.1, AP II ("…persons deprived of their liberty for reasons related to the conflict, whether they are interned or detained").

intervention or criminal process;[55] under the law of international armed conflict (in a standard increasingly adopted for non-international armed conflict), the detainee may be detained for the duration of the conflict,[56] or as long as they are an imperative threat to security.[57] The prevention of "arbitrary detention" under both bodies of law is effected by the "due process" provided under IHRL or IHL.

What Process is Due?

The *lex generalis* of human rights law is to ensure that the detention is not arbitrary. In the detailed criminal process of states, due process consists of habeas corpus, or the presentation of a defendant before a judge or magistrate;[58] but such a process may be derogated from, as noted above, and the procedures for each state involved in multinational operations are distinctly different; finally, the U.S. maintains that the criminal due process provisions from the ICCPR and federal rules do not have extraterritorial effect.

With respect to the law of armed conflict, or the *lex specialis* in the U.S. view, the procedures for due process must be extrapolated from the law for international armed conflicts. It is clear that the U.S. made a mistake, early in Afghanistan, by not instituting Article 5 tribunals to determine the status of the belligerents we captured on the battlefield.[59] But the

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[55] *See, e.g.*, Rule 5-5.1, Federal Rules of Criminal Procedure (FRCP) ("An officer making an arrest…shall take the arrested person without unnecessary delay before the nearest available federal magistrate…A [felony] defendant entitled to a preliminary examination…by a judge of the district court… [shall be presented for such examination] within a reasonable time, but in any event not later than 14 days after the initial appearance if the defendant is in custody...")

[56] Art. 118, GC III.

[57] Art. 78, GC IV.

[58] *See, e.g.*, Rule 5-5.1, FRCP, note 55, *supra*.

[59] See Art. 5, GC III ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [combatants or civilians accompanying the force], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.") The President's determination of 7 February 2002, note 46, *supra*, was that there was no "doubt" as to the status of Taliban and al Qaeda detainees, ¶ 2d.

U.S. Supreme Court case of *Hamdi*, [60] from 2004, made it clear that the due process described in Army Regulation 190-8,[61] built on Article 5 due process, was the right approach to the review of detention. As noted above, CPA Memo 3 mandated civilian internee process and treatment of all who were captured in Iraq during the period of occupation and afterward. And the Multinational Force Review Committee (MNFRC) process in Iraq and the Detainee Review Board (DRB) process in Afghanistan, adopted as both conflicts were transitioning to a situation where the territorial states were increasingly in the lead, were clear applications of the Article 78 standard from GC IV,[62] applied to non-international armed conflicts. Both of these procedures also demonstrated, through the incorporation of individual representatives, video teleconference testimony from village elders, and local judges, for example, what was in the art of the possible for the host nation, as they transitioned to a domestic law enforcement regime.[63]

After *Hamdi*, the U.S. modeled the Combatant Status Review Boards and Administrative Review Boards, employed to review the status of "enemy combatants" at Guantanamo, on those same procedures outlined in AR 190-8, GC III, and GC IV.[64] But human rights law, including *habeas corpus* rights, became increasingly important for the Guantanamo detainees. For the US Supreme Court, applying the LOAC standards only went so far; in *Boumediene* (2008), Justice Kennedy, writing the lead opinion for the U.S. Supreme Court, opined that the HR requirement for judicial review of detention was to be applied on a "sliding scale," depending on the place of detention, the citizenship

[60] *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633 (2004) (holding that detention was authorized incident to the Congressional authorization for "necessary and appropriate force", and requiring administrative review (notice and an opportunity to respond) of the U.S. citizen's detention, favorably noting the procedures of AR 190-8).

[61] U.S. Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees* (1997), ¶ 1-6 Tribunals (describing "competent tribunals" as consisting of three commissioned officers, conducting administrative review of cases and evidence, including any statement by individuals concerned).

[62] Bovarnik, note 48, *supra*.

[63] *Ibid*.

[64] Deputy Secretary of Defense, Memorandum for Secretaries of the Military Departments, *Subject: Implementation of Combatant Status Review Procedures for Enemy Combatants Detained at U.S. Naval Base, Guantanamo, Cuba*, 14 July 2006, *available at*: www.haguejusticeportal.net/Docs/NLP/US/CSRT_procedures_14-7-2006.pdf.

and process made available to the detainee, and "practical considerations", like the availability of administrative and judicial resources, as well as the duration of the confinement.[65] That case mandated access to attorneys, certain procedural protections, and federal judges.[66] An explosion of habeas cases ensued in the US courts for Guantanamo detainees. In the final analysis, applying Justice Kennedy's sliding scale, the DC District Court decided not to apply habeas to battlefield detention in Bagram, Afghanistan, in *Maqaleh v. Gates*.[67] And a 2012 National Defense Authorization Act provision included the use of military judges and defense counsel for "long-term detention under the law of war", in an effort to hold off further habeas review.[68] Finally, there are demonstrable elements of both HR standards [access to attorneys, preservation of habeas rights] and LOAC detention [6-month periodic review] in the Executive Order for processing of enduring GTMO detainees.[69] Over time, in the area of due process, the United States has demonstrated a gradual transition from the *lex specialis* of the law of war to a detailed application of the law of peace, particularly in the application of *habeas corpus* (due process) standards for Guantanamo detainees.

Detainee Treatment Issues

Detainee treatment issues are another illustration of the intersection between these two bodies of law, with a heavy emphasis on the *lex specialis* of the law of war. The U.S. detainee treatment standards in non-international armed conflict, what is termed "minimum humane treatment standards", are entirely consistent with CA3, Article 4 of AP II, and Article 75 of AP I.[70]

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[65] *Boumediene v. Bush*, 553 U.S. 23, 128 S.Ct. 2229 (2008), at 59-60, 63, 89 (specific criteria, plus the aspect of time, noting six years of confinement for the petitioner).

[66] *Ibid*., at 61.

[67] *Al Maqalah v. Gates*, 605 F. 3d 84 (2010).

[68] 2012 National Defense Authorization Act, para. 1024, *available at*: https://www.congress.gov/112/plaws/publ81/PLAW-112publ81.pdf (This provision has not been implemented by the DoD, as there were no additional "long-term detainees" held by the U.S. [outside Guantanamo] after 2012).

[69] Executive Order 13567, *Periodic Review of Individuals Detained at Guantanamo Naval Station, pursuant to the Authorization for Use of Military Force*, 7 March 2011, *available at*: https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-bay.

[70] DoD LOWM, para.8.2; *see also* Executive Order.

However, the U.S. trains its Soldiers and Marines to the GC III (Prisoner of War) and GC IV (Civilian Internee) standards, and that is always their starting point in US military operations, or any armed conflict, "no matter how characterized".[71] Pursuant to President Obama's 2009 Executive Order,[72] the Department of Defense evaluated the treatment standards at Guantanamo, using the both CA3's "humane treatment" standard and the more extensive treatment provisions of GC III and GC IV as the "measuring stick" for detainee treatment at Guantanamo, and it passed with flying colors.[73] Finally, U.S. doctrine has taken this approach of applying the "gold standard" of the Geneva Conventions to all our detainees, even "unprivileged belligerents", who will be treated consistent with civilian internee standards in the Civilians Convention (GC IV), except where senior officials decide to derogate for "imperative reasons of security" [e.g., segregation of insurgents who continue to fight inside the wire from the rest of the Civilian Internee population].[74]

Although Geneva Convention standards provide extensive guidance on the treatment of individuals detained under the law of war for the duration of hostilities, there are occasionally gaps in the law that can be filled in by domestic law, or human rights standards. The DoD LOWM uses national elections as an example of an area of human rights, or domestic law, that does not overlap with the LOAC.[75] In Guantanamo, after inquiries from the Inter-American Court of Human Rights and the Council of Europe, Committee Against Torture, regarding "enteral feedings" (forced feeding

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[71] *See* DoD Directive 2311.01E, *DoD Law of War Program*, note 43, *supra*, and AR 190-8, note 61, *supra*.

[72] *See* Executive Order 13492, *Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities*, 22 January 2009, para. 6, *available at*: https://www.govinfo.gov/content/pkg/DCPD-200900005/pdf/DCPD-200900005.pdf.

[73] Department of Defense, Report, *Review of Department Compliance with President's Executive Order on Detainee Conditions of Confinement* (2009), *available at*: https://archive.defense.gov/pubs/pdfs/REVIEW_OF_DEPARTMENT_COMPLIANCE_WITH_PRESIDENTS_EXECUTIVE_ORDER_ON_DETAINEE_CONDITIONS_OF_CONFINEMENTa.pdf.

[74] *See, e.g.*, Department of the Army, Field Manual 27-10, The Law of Land Warfare (1956), ¶¶ 247(b) & 248.

[75] DoD LOWM, para. 1.6.3.1.

of hunger strikers), it was not clear that the LOAC standards of "humane treatment" and maintaining the health of the detainee are definitive on the issue of keeping a detainee alive against his will.[76] As the human rights standards on this issue differ between the U.S. and European states on this issue, due to the application in Europe of the European Convention of Human Rights, authorities at Guantanamo applied the U.S. Bureau of Prison standards that prescribed enteral feeding when the life of the detainee was threatened and it was medically necessary.[77] So in the one area where the law of armed conflict standards was inadequate, human rights standards (albeit standards inconsistent in international human rights law) were valuable in filling the gap.

Interrogation

The final area where human rights law and the law of armed conflict interacted during the war on terror was the controversial area of interrogation standards. Early on, from 2002 to 2005, the U.S. "harsh interrogation techniques" arguably violated both LOAC and IHRL standards;[78] CA3 and the Convention Against Torture both prohibit torture and cruel, inhuman and degrading treatment. But *Hamdan*[79] and Executive Order 13440 applied CA3 standards to interrogation by the Central Intelligence Agency, and the latter adopted a constitutional (HR) standard of treatment.[80] The Detainee Treatment Act of 2005 required the military to apply the interrogation standards listed in the Interrogation

[76] *Compare* Art. 91, GC IV (Civilian Internees must "have the attention they require" within the camp infirmary, under the supervision of a medical doctor.) *with* Art. 11, AP I (A requirement to protect the "physical or mental integrity" of detainees, including application of "generally acceptable medical standards". Note that the U.S. is not bound by AP I and does not view this provision as customary international law.)

[77] DoD Report, note 72, *supra*, at 56.

[78] *See* Dick Jackson, "Interrogation and Treatment of Detainees," The War on Terror and the Laws of War, 2d Ed., Oxford University Press, 2015, pp. 101-130.

[79] *Hamdan*, note 47, *supra*.

[80] George W. Bush, Executive Order 13440*, Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*, 20 July 2007, para. 2c ("'Cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the

Field Manual;[81] this manual was later re-promulgated as FM 2-22.3,[82] the only interrogation field manual published (in an attempt at transparency over the torture embarrassment) by military establishments throughout the world. The Field Manual requires compliance with the interrogation standards of Article 17, GC III, prohibiting the use of coercion, threats, insults, or "disadvantageous treatment of any kind" in interrogating detainees; these rules are applicable for all intelligence interrogations, including tactical questioning and battlefield interrogations.[83] In 2009, the Military Commissions Act adopted a criminal interrogation (HR) standard[84] for the admissibility of statements of unprivileged belligerents brought before the Military Commissions,[85] however; this approach, evaluating the "voluntariness" of the statement, did allow for battlefield statements under an exigency approach, generally consistent with court martial practice.[86] Initial intelligence interrogations must follow the Field Manual and the Prisoner of War Convention, while law enforcement interrogations must be consistent with human rights law, as established by U.S. domestic law.

Domestic Human Rights Standards

With the illustrations provided above, it can be seen that there has been a significant progression in U.S. detention practice from the initial customary international human rights standard of preventing "prolonged arbitrary

Constitution of the United States."), *available at*: https://www.govinfo.gov/content/pkg/WCPD-2007-07-30/pdf/WCPD-2007-07-30-Pg1000.pdf.

[81] Detainee Treatment Act of 2005 (section 1003 of Public Law 109–148 and section 1403 of Public Law 109–163), para. 1002(a), *available at*: https://ihl-databases.icrc.org/ihl-nat/a24d1cf3344e99934125673e00508142/b22319a0da00fa02c1257b8600397d29/%24FILE/Detainee%20Treatment%20Act%20of%202005%20.pdf.

[82] Department of the Army, Field Manual 2-22.3, *Human Intelligence Collector Operations*, September 2006, *available at* https://www.hsdl.org/?abstract&did=466660.

[83] *Ibid*, at ¶¶ 1-20, 5-73.

[84] See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1662 (1964) (Custodial interrogations are inherently coercive in nature; voluntariness is the standard applied).

[85] Military Commissions Act of 2009, 10 U.S.C. para. 948r(c).

[86] Jennifer Elsea, Congressional Research Service, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, 4 Aug 2014, p. 28, *available at*: https://fas.org/sgp/crs/natsec/R41163.pdf.

detention". Because of the extensive protections for victims of armed conflict provided by the law of war, particularly the law of international armed conflict, it is easy to see why states feel comfortable with using these provisions, or the principles manifested in the law, in adopting Copenhagen Principles and Guidelines, or applying the law of war for international armed conflict as a matter of policy. But the *Boumediene* case and Justice Kennedy's sliding scale analysis argue for a gradual application of human rights standards over time; eventually, the law of peace, human rights, or domestic law must apply to those who are detained interminably in the endless war on terror.

Conclusion

The US and the Canadians have avoided many of the pitfalls of human rights, or domestic law, prevailing on the battlefield, unlike many of our European allies. The most obstructive aspects of the human rights regime involve mandating domestic legal procedure, an independent judiciary, peacetime investigative regimes, and victim compensation requirements not required in the law of armed conflict.[87] In armed conflict, which balances humanitarian concerns with military necessity, the controlling body of law must be the law of armed conflict to maintain this balance. But, for multinational operations, where the territorial state must eventually be restored to a state of peace, it behooves the participating states to develop a transition plan from application of the law of war to the law of peace [particularly the human-rights-based regime of the territorial nation].

Where is the US moving on this issue in its operations? There has been no further official comment on the detention issues in the current administration. It is telling that those ISIS prisoners transferred to US jurisdictions for trial are being confined and treated under domestic criminal law.[88] The cases regarding Guantanamo detainees have clearly demonstrated a progression from LOAC to HR application, over time. But there may still be another round of habeas litigation, now that Guantanamo

[87] See, e.g., *Al Skeini*, note 28, *supra*.

[88] Charlie Savage, *U.S. Moves to Take 'High-Value' ISIS Detainees, Including Britons Who Abused Hostages*, Washington Post, 9 Oct. 2019, *available at*: https://www.nytimes.com/2019/10/09/us/politics/beatles-isis-us-custody.html.

detainees have been reduced to the hard core, or the impossibility to repatriate. There could also be more legislation from Congress, authorizing long-term administrative detention as an alternative to LOAC detention; or (more likely) Congress could stick with the LOAC detention authorizations they have issued to date.

The US experience has demonstrated a complementary relationship between HR and LOAC, with LOAC being predominant in armed conflict [the "controlling body of law"], but giving way to HR application to those originally detained under LOAC standards as time and distance increased from their original battlefield detention. The bottom line, though, is that there is no "no law zone," as some may have contended in early 2001/2002; LOAC and HR law have had an immense impact on detention operations.

Ady Niv

The Tension between IHL and IHRL in Practice

Introduction

International Humanitarian Law (IHL) and International Human Rights Law (IHRL) were born from different doctrines and necessities, have grown in separate cradles, and formalized across different international instruments. IHRL meant to regulate the relationship of the State with the individuals in its own territory in times of peace. IHL, on the other hand, is mostly concerned with regulating the relationship of a State with the subjects of the adversary. It was created to limit the effects of war and, consequently, is applicable in any territory where conflict exists.

That being said, the principal *raison d'être* of both modern International Humanitarian Law and International Human Rights Law is to promote the protection of individuals and safeguard their rights and freedoms.[1] Therefore, it is only natural that the two fields of law overlap in the domains that they both aim to protect and regulate. IHL conventions cover many issues related to Human Rights norms, such as the treatment of those deprived of their liberty,[2] the protection of children and workers,[3] and the protection of fundamental human rights.[4] At the same time, IHRL

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[1] *See*, *e.g.*, the preambles of the Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) *and* International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). *See also* ICTY, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 183.

[2] *See* Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV), Art. 37; Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III), Art. 42.

[3] *See* GC IV, *supra* note 2, Arts. 50, 52.

[4] *See* Common Article 3 of the Geneva Conventions of 12 August 1949; Protocol 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 3 (AP I), Art. 75; Protocol Additional to the Geneva

instruments acknowledge the parallel relevancy of IHL, whether by recognizing that certain human rights may be derogated from in times of war, as in the ICCPR,[5] or by plainly reiterating the obligation of States to "ensure respect for rules of international humanitarian law applicable to them in armed conflicts", as in the Convention on the Rights of the Child.[6]

Notwithstanding that certain norms of both law branches converge in their essence, according to the traditional approach IHL and IHRL are separate legal frames, created for different purposes, with separate temporal and geographical spaces. However, as simply stated by the International Court of Justice, which represents the favored modern position,[7] there are three possible scenarios — rights can be governed by IHL exclusively, by IHRL exclusively, or by both.[8]

In this contribution, it is the third situation that will be discussed, focusing gradually from the macro level to a micro one. The aim is to examine how the tension between IHL and IHRL is translated into the field. With that purpose in mind, the starting point will be to highlight some of the difficulties in recognizing a situation where IHRL co-exists with IHL;

Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 609 (AP II), Art.4.

[5] *See* ICCPR, *supra* note 1, Art. 4. *See also* Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950) ETS 5 (ECHR), Art. 15; American Convention on Human Rights (adopted 22 November 1969, entered into force 1978) 1144 UNTS 123 (ACHR), Art. 27.

[6] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Art. 38(1). *See also*, with regard to IHL texts, AP I, *supra* note 4, Art. 75(7) (referring to "prosecution and trial *in accordance with the applicable rules of international law*" (emphasis added)).

[7] *See*, *e.g.*, the summary of positions in Theodor Meron, *The Humanisation of Humanitarian Law*, 94 Am. J. Int'l L. 239 (2000), 266-273.

[8] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004, p. 136, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168, para. 216. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 25; Human Rights Committee, General Comment 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 3.

it will be followed by a brief discussion on their dynamics (as this issue has already been discussed extensively in academic writings); and, finally, the tension in applying both branches of international law in parallel to a specific situation will be illustrated and discussed through the use of a test case.

The Undetermined Parameters of IHRL

One of the preliminary difficulties in identifying armed conflict situations where IHRL is applicable lies in delineating the geographical scope of the specific international instrument.[9] The extraterritorial applicability of the ICCPR, for example, is disputed. The ICJ and the Human Rights Committee opined that the prerequisite for the application of the ICCPR — that a person will be "within [the State's] territory and subject to its jurisdiction" — could include scenarios taking place outside the territory of the State,[10] while States like the USA and Israel disagree with such interpretation.[11]

[9] For the sake of brevity, the discussion in this part of the contribution is limited to international treaties and does not include a discussion on human rights that are part of customary international law. For the same reason, the requirements for the existence of an armed conflict, which will trigger the applicability of IHL, is not discussed.

[10] See *ICJ Advisory Opinion on the Wall, supra* note 8, paras. 109, 111; Human Rights Committee, General Comment No. 31 (80) The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (adopted on 29 March 2004), U.N. Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 10.

[11] See *ICJ Advisory Opinion on the Wall, supra* note 8, para. 110 (and the cases mentioned therein); Observations of the United States of America On the Human Rights Committee's Draft General Comment No. 36 On Article 6 — Right to Life, 6 October 2017, *available at*: https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/UnitedStatesofAmerica.docx, accessed 2 February 2020, para. 13; *The Department of Defense Law of War Manual*, 12 June 2015 (revised 31 May 2016), para. 1.6.3.3. *See also*, with regard to a similar dispute concerning the application of the Convention Against Torture in times of war and beyond the State's territory, Committee Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention*, U.N. Doc. CAT/C/US/CO/2, 25 July 2006, paras. 14-15; and with regard to the limited application of Canadian Charter of Rights and Freedoms extraterritorially, Federal Court of Canada, *Amnesty International Canada v. Canada* (Chief of the Defence Staff) [2008 FC 336] 25 January and 12 March 2008.

Even assuming that a Human Rights instrument could apply extraterritorially, it is still to be determined whether the circumstances satisfy the conditions for the instrument to apply. For example, it is debatable whether an aerial attack by a State outside of its borders which results in fatalities would be sufficient to establish the State's jurisdiction over the victims (for the purpose of triggering the obligations of the Human Rights instrument). According to the European Court of Human Rights (ECtHR), NATO's bombing of three television channels and four radio stations in the Federal Republic of Yugoslavia did not establish the necessary jurisdictional link between the victims of the attack and NATO Member States for the purpose of the ECHR.[12] In contrast, the Inter American Commission on Human Rights (IACHR) found that the attack of Cuba's Air Force on two civilian airplanes in international airspace put the latter under the authority of the former and, as a result, the ACHR was applicable in this case extraterritorially.[13]

While the described disparity in the applicability of Human Rights could have been explained on the basis of these being two distinct regional Human Rights instruments, both institutions (the ECtHR and the IACHR) recognized that the jurisdictional condition in both the ECHR and ACHR is similar.[14] Moreover, even if the difference in the scope of Human Rights' applicability could have been legally justified, such inconsistent and fragmented application of human rights could hinder the interoperability of joint military ventures, as in the case of

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[12] ECtHR, *Banković and others v. Belgium and others*, Decision, 12 December 2001, paras. 74-82. According to Article 1 of the ECHR, the High Contracting Parties "shall secure to everyone w*ithin their jurisdiction* the rights and freedoms defined…" (emphasis added).

[13] Inter American Commission on Human Rights, Case 11.589, *Armando and Others (Cuba)*, Report 86/99, 29 September1999, para. 25. According to Article 1 of the ACHR the States Parties "undertake to respect the rights and freedoms recognized herein and to ensure to all persons *subject to their jurisdiction*…" (emphasis added).

[14] *See ibid*., para. 24 (referring to the position of the European Commission on Human Rights regarding the interpretation of the term "within their jurisdiction"); *Banković and others, supra* note 12, para. 78 (acknowledging that "the text of Article 1 of the American Convention on Human Rights 1978 […] contains a jurisdiction condition similar to Article 1 of the European Convention").

NATO, where Member States have to operate according to their own legal (and regional) obligations.[15]

Presuming that IHRL is applicable in the specific armed conflict scenario, the second step is to discuss its dynamics with IHL.

The Relationship between IHL and IHRL

There are several approaches regarding the interplay between IHL and IHRL when both regimes are applicable to a situation. Some consider it to be one of complementarity or mutual reinforcement.[16] In such cases, the interplay of the two regimes is not problematic as there is neither collision nor friction in their implementation. There is no need for a hierarchal based interpretation; an IHRL norm can assist the interpretation of an IHL norm, and vice versa. This reciprocal relationship is exemplified where IHL guarantees fair trial rights while the interpretation of similar IHRL norms provide further clarity and substance.[17] Similarly, the prohibition of torture in the Geneva Conventions[18] would have been less concrete and wanting specificity if not for the definition of the crime in the Convention Against Torture.[19]

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[15] *See* Col. Kirby Abbott, *A Brief Overview of Legal Interoperability Challenges for NATO Arising from the Interrelationship between IHL and IHRL in Light of the European Convention on Human Rights*, International Review of the Red Cross (2014) 96 (893), 107-137, 122.

[16] *See*, *e.g.*, Human Rights Committee, General Comment No. 31 (80) The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (adopted on 29 March 2004), U.N. Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 11; United Nations, The Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, 2011, pp. 8, 34, 57.

[17] The right to be tried by an independent and impartial court is guaranteed in Article 84 of GC III (with regard to POWs), but the requirements for independency and impartiality can be found in decisions and jurisprudence of institution (such as the ECtHR) interpreting the equivalent right in IHRL instruments.

[18] *See*, *e.g.*, Geneva Conventions Common Article 3; GC IV, Art. 147; GC III, Arts. 17, 87, 130.

[19] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, Art. 1; *See* ICTY, *Prosecutor v. Anto Furudžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 111 (confirming the Trial Chamber's conclusion that Article 1 of the

However, when IHL and IHRL provisions are in conflict, it is the interpretation tool of *lex specialis derogat leges generalis* that is commonly invoked.[20] In a nutshell, according to the principle of *lex specialis*, in the case of conflict between two rules governing the same issue, the more specific rule is favored. But even the exact application of *lex specialis* is subject to controversy.[21]

For example, some perceive that since IHL was designed for armed conflict situations, the whole branch should be considered *lex specialis* and, accordingly, should be favored when in conflict with Human Rights norms. However, some argue that this approach is erroneous and that *lex specialis* should be used at a lower level, examining which specific rule is better tailored to the circumstances.[22]

Having summarized some of the theoretical dilemmas in IHL and IHRL's relationship, the next part of the contribution will examine the difficulties in applying them in a specific scenario.

A Test Case of Concurrent Applicability — Riots at the Border

There are several situations in the context of an armed conflict where resolving the friction between IHL and IHRL is legally challenging.[23]

Convention Against Torture reflects customary international law and that the definition of the elements of the crime, as described by the Trial Chamber based on the Convention, are correct for the crime of torture in a situation of armed conflict). *But see also* Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 Isr. L. Rev. 310 (2007), 342, 347 (explaining that the definition of torture in the Convention needs to be adapted to fit the humanitarian law rationale since "torture can also be committed by armed opposition groups" and therefore are not acting on behalf of a State).

[20] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 7, para. 106; *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 7, para. 25; Droege, *supra* note 19, pp. 337-340.

[21] *See*, *e.g.*, Abbott, *supra* note 15, pp. 117-119; *International Legal Protection of Human Rights in Armed Conflict*, *supra* note 16, pp. 58-64.

[22] *See*, *e.g.*, Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, (2nd ed. Oxford University Press, 2008), p. 75; *International Legal Protection of Human Rights in Armed Conflict*, *supra* note 16, pp. 67-68.

[23] A series of examples of problematic situations are discussed in ICRC, *Expert Meeting — The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms*, (Nov. 2013).

The elusiveness of a harmonious solution manifested in the case of *Hassan v. The United Kingdom*, where the ECtHR acknowledged that the grounds for detention listed in Article 5 of the ECHR do not include internment or preventive detention (without the intention of future prosecution) that are permissible in IHL (such as in the case of prisoners of war),[24] but at the same time it was forced to conclude that only "in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers".[25] In the same vein, the Court interpreted the procedural safeguards regarding detention in Article 5 by taking into account the context and the applicable rules of IHL.[26]

The tension between the two branches of international law is heightened when the core of the problem is not necessarily in the reconciliation of the different norms, but rather when both norms occupy the same temporal and geographical space without converging at all. This would be arguably the case in a scenario where, during an ongoing armed conflict between State A and State B, hundreds of individuals of State B (with unknown intention or organizational affiliation) approach the border between the two States and protest.[27] In this scenario, the protest includes considerable violence against State A and segments that are actively trying to penetrate State A's territory

[24] *See* ECtHR, *Hassan v. The United Kingdom* (Application No. 29750/09), Judgment, 16 September 2014, para. 97.

[25] *Ibid*., para. 104.

[26] *Ibid*., para. 106. A similar, though not identical, tension exists with the right not to be arbitrarily detained in Article 9 of the ICCPR. For example, according to Article 9(4) the person detained has the ability to take proceedings before "a court", whereas according to Article 78 of GC IV a civilian who is detained has a right to appeal, not necessarily before "a court". *See also* Human Rights Committee, Draft General Comment No. 35 (Article 9: Liberty and Security of Person), Comments by the Government of Canada, 6 October 2014, para. 13; *and how it was resolved in* General Comment No. 35 (Article 9: Liberty and Security of Person), U.N. Doc. ccpr/c/gc/35, 16 December 2014, para. 15.

[27] A similar scenario, though arguably less complicated as the riot was in the context of a non-international armed conflict, was discussed in the ICRC's *Expert Meeting*, *supra* note 23, pp. 24-29.

by damaging the border fence. The crucial question in this scenario is whether the interaction between soldiers of State A and the protesting population of State B is governed by IHL, IHRL, or both.

Understanding which branch of law applies will determine the relevant rules of engagement (RoE) and the boundaries within which the soldiers may act. If the situation is governed by IHRL, then the right to life requires that the operation will be planned and conducted in such a way as to minimize to the extent possible the use of lethal force. The use of lethal force can only be used in response to imminent threat of death or serious injury, and must be used only as a last resort. In contrast, if IHL governs the situation, the use of lethal force against combatants (not *hors de combat*) or civilians who directly participate in hostilities is permitted; the soldier executing the attack is not required to consider the immediacy or the scale of the threat (presuming that no collateral damage is anticipated).

Misidentifying the correct paradigm in such situations may have lethal consequences, can expose the soldier to criminal responsibility, or hinder the legal execution of his military obligations.

In this "riots at the border" scenario, it could be argued, on the one hand, that IHL applies exclusively since there is an armed conflict between the two States, and the actions of State B's individuals at the border are directly connected to the conflict and have direct negative consequences on the security and territorial integrity of State A. The forces that guard the borders have no possibility of conducting arrests and are traditionally not equipped nor trained with mob dispersing weapons. Any response to the violence or any action to thwart attempts to breach the border of State A will necessarily have an effect on the territory of State B. Depending on the exact circumstances, some of State B's participants may be classified as combatants (if they fulfill the necessary conditions) or as civilians participating directly in the hostilities. On the other hand, one could argue that as a protest — an activity traditionally considered to fall under the umbrella of police duties — in the territory of State B, it is a law enforcement paradigm that govern this situation, regulated by IHRL, and that any action to penetrate the territory of State A should not be considered as an attack within the armed conflict, but rather as a criminal act of illegal entry.

Obviously, the problem with the first approach is that at least part, if not most, of the population gathered at the border is presumed to be civilian,[28] participating peacefully in a protest on the territory of the adverse State. As such, they cannot be the subject of any attack.[29] The decision of the population to stand next to the border of an opposing State or the presence of military targets within the crowd, in and of itself, does not affect its immunity from being attacked. Adopting an arguably lower threshold for using lethal weapons would expose the civilians' lives to a risk that otherwise could have been avoided. The problem with the second approach is that it ignores the context of the armed conflict altogether, and that State A lacks effective control over the territory of State B. From a practical point of view, it also ignores that soldiers guarding a border in war time are not normally equipped for law enforcement activities, as well as that IHRL requirements may unnecessarily put soldiers' lives in peril and encourage similar behavior which jeopardizes the lives of civilians in an armed conflict.

National jurisprudence dealing with such issues is quite rare. However, in 2018, the Supreme Court of Israel (sitting as the High Court of Justice) had to decide which norms apply in a similar, but more complex, scenario that took place at the unofficial border of Israel and the Gaza Strip. According to the facts of the case[30] — as understood by the Court — during the "the great return march" of 2018 in Gaza, thousands of Palestinians were protesting along the border with Israel in different locations. The protests included riots, attempts to damage Israel's security infrastructure, as well as participants involved in clashes with Israel's security forces, using explosive devices and live ammunition aimed towards the soldiers and Israeli territory.[31]

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[28] As required by the customary rule that is formulated in Article 50(1) of AP I, *supra* note 4("In case of doubt whether a person is a civilian, that person shall be considered to be a civilian").

[29] In this scenario it is presumed that the peaceful participation in the protest is not aimed to assist or to shield those directly participating in hostilities.

[30] HCJ 3003/18, 3250/18 *Yesh Din et al. v. IDF Chief of Staff et al.*, Judgment, 24 May 2018, *available in English at*:https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts%5C18%5C030%5C030%5Ck08&fileName=18030030.K08&type=4).

[31] *See*, *ibid*., Deputy Chief Justice Melcer, paras. 5-16.

The petitioners challenged the RoE as they believed that the RoE (which are classified) allowed Israel's soldiers to use lethal force against protesters who did not pose an immediate danger to soldiers' lives. In response, the State explained that while the RoE are static, the paradigm in which they operate is dynamic and changes — between law enforcement and hostilities paradigms — according to the circumstances (such as the threat and its immediacy, the involvement of terrorist entities, etc.). It was also stated that the law enforcement paradigm was the default choice, and that the use of live ammunition towards the legs of a "central rioter" or "central inciter" was carried out only as a last resort.[32]

For the purpose of this contribution, the only relevant part of the Court's opinion is with regard to the applicable legal framework. Deputy Chief Justice Melcer, writing the leading opinion, concluded that:

> "which paradigm regulates a specific exercise of force is a complicated and complex question, which first and foremost depends on whether the exercise of force is part of the hostilities. It is therefore difficult to classify complex events under only one paradigm, because hostilities in an armed conflict are often intermingled with other actions."[33]

The practical conclusion from this case is that potential lethal force may be used: (i) for dispersing a mass riot from which an actual and imminent danger is posed to life or bodily integrity, subject the conditions of necessity

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[32] *See*, *ibid*., Deputy Chief Justice Melcer, paras. 26, 39.

[33] *Ibid*., Deputy Chief Justice Melcer, para. 39. It is important to note that the Court adopted a unique and questionable approach with regard to the relevant normative framework — instead of discussing the applicability of IHL and IHRL to the situation, it accepted the position of the State that only the laws of armed conflict apply and that, within this branch of international law, there are two paradigms — the conduct of hostilities paradigm and the law enforcement paradigm which may be inspired by Human Rights norms. However, the State was of the view that the conditions for using lethal force according to both the "law enforcement paradigm" and those of using lethal force according to IHRL, in the specific circumstances of the case, had in essence the same outcome vis-à-vis the RoE. Therefore, the position of the court regarding the interrelation between the two paradigms is relevant to the discussion on the tension between IHL and IHRL in the "riots at the border" scenario.

and proportionality (as defined in IHRL);[34] or (ii) against civilians directly participating in the armed conflict (as defined in IHL) that exists between Israel and Hamas.[35]

In other words, the Israeli security forces have to "operate interchangeably within the course of one same event in accordance with the different rules that apply under each of the two paradigms",[36] and possibly examine the appropriate paradigm for each concrete use of force.[37] This "interchangeable applicability" approach,[38] shifting between IHL and IHRL norms in the same situation according to the specific facts of the case, is legally clear but, as acknowledged by the Court and during an ICRC's expert meeting,[39] is extremely challenging and possibly prone to mistakes when implemented in the field.

First, in the same scenario, which paradigm would apply if an individual of State B lights up a Molotov cocktail to be thrown into the territory of State A? Should the soldier consider that person as a civilian who directly participates in the hostilities, who loses for that time his civilian immunity and can be targeted according to IHL; or rather is he part of a protest that became violent, and the soldier should first exhaust other less lethal means (such as warning shots) and, if necessary and proportional (according to IHRL), may only shoot at the lower part of that person's body to thwart the violent act?

Furthermore, can the soldier use tear gas? If the soldier is acting as a law enforcer within the realm of IHRL, he has the obligation to exhaust non-lethal means that are at his disposal, such as tear gas. But if the rioter is actually a civilian who is attacking in the context of the armed conflict, the soldier is bound to the rules of IHL, according to which the use of

[34] As mentioned above, *ibid*., neither the State nor the Court actually referred to IHRL as the applicable legal framework (though the discussion included IHRL and ECtHR jurisprudence regarding the legality of using potential lethal force when dealing with a protest).

[35] *Ibid*., Deputy Chief Justice Melcer, paras. 41-46; Chief Justice Hayut, para. 11.

[36] *Ibid*., Chief Justice Hayut, para. 7.

[37] *Ibid*., Chief Justice Hayut, para. 4.

[38] Also called by some the "parallel approach", *see ICRC Expert Meeting*, *supra* note 23, pp. 24-29.

[39] *See ICRC Expert Meeting*, *supra* note 23, p. 26.

chemical weapons is forbidden.[40] Interestingly, Australia's Law of Armed Conflict Manual, which confirms that the use of tear gas is prohibited as a means of warfare, suggests seeking legal advice in case the use of tear gas is considered in times of war, such as in the case of a riot (which could then be a legal weapon).[41]

If law enforcement methods should be used in such a situation, State A may want to send undercover agents to the protest in order to conduct arrests and prevent further escalation. However, such infiltration by State A agents to the territory of State B may escalate the armed conflict between the two states and be considered as an attack or an activity tantamount to exercising authority in State B's territory.[42] In addition, if the undercover agents notice a person within the mob who is about to shoot at the soldiers of State A as part of the hostilities and they kill him, they expose themselves to the risk that their act will be construed as perfidy.[43]

This "interchangeable applicability" of IHL and IHRL, as adopted by the Court and advocated by experts,[44] is extremely challenging since it is difficult to compartmentalize a specific agitated and volatile zone according to distinct IHL and IHRL boundaries; to apply both to the same geographical and temporal space while trying to identify on a case-by-case basis whether the specific individual is to be treated according to the norms of the former or the latter.

In trying to guide soldiers in the context of an armed conflict on how to identify a civilian who is directly participating in hostilities, the US Naval Handbook refers to "the person's behavior, location, attire, and other information available at the time", while "[t]he temporal, functional, and geographical proximities of the activity to combat are factors to be

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[40] *See*, *e.g.*, ICC Statue, Art. 8(2)(b)(xviii).

[41] Australia, Law of Armed Conflict Manual (2006), para. 4.19.

[42] *See*, *e.g.*, ICTY *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Judgement, 29 November 2017, Vol. 1, para. 320-345 (confirming the conclusion of the Trial Chamber that the territory was occupied, based, *inter alia*, on the finding that the forces had the capacity to execute arrests).

[43] In the described situation while the intention of the soldiers to deceive the adversary in the context of the armed conflict is lacking, it is likely that the legality of their behavior will be questioned.

[44] See *ICRC Experts Meeting*, *supra* note 23, p. 25.

considered, but not necessarily dispositive".[45] Using these guidelines, by analogy, on the "riots at the border" scenario does not provide any clarity on how to differentiate a civilian who acts in the context of an armed conflict from a violent protester mentioned above.

A derivative question with regard to this scenario is when a duty to investigate the death of a civilian (in contrast to a combatant) arises. In both IHL and IHRL there is an obligation to investigate when it is suspected that the death resulted from a forbidden behavior. However, when the death was caused by a state agent during law enforcement operations, the duty to investigate is triggered, but it will not necessarily be triggered under IHL. For example, a prohibited behavior cannot be presumed if the civilian was killed while directly participating in hostilities or, regrettably, as part of collateral damage that was not excessive in relation to the concrete and direct military advantage that was anticipated in attacking the military target.[46]

In addition, the procedural aspects of an investigation, such as its transparency, may differ greatly between investigations conducted within IHRL framework and investigations conducted in the context of an armed conflict. For example, the basis for the assessment that a civilian was directly participating in hostilities or of the direct military advantage of attacking a nearby target, is unlikely to be shared.[47]

Considering that both IHL and IHRL aim to preserve human rights and minimize human suffering, in particular in harsh situations, and that the right to life is the basis for all other rights, it could be validly argued,

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[45] U.S.A., *The Commander's Handbook on the Law of Naval Operations* (ed. August 2017), Art. 8.2.2.

[46] *See* AP I, *supra* note 4, Arts. 51(5)(b), 57.

[47] *See*, *e.g.*, Comments of the Netherlands to the Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on Right to Life, p.6 (available at: https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/KingdomofNetherlands.docx) ("IHL does not require disclosing criteria for attacking with lethal force, and this cannot be considered realistic in the face of the realities of military operations."); Observations of the United States of America On the Human Rights Committee's Draft General Comment No. 36 On Article 6 — Right to Life, 6 October 2017, para. 18, *available at*: https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/UnitedStatesofAmerica.docx.

by analogy to the presumption of civilian status in IHL, that if there is a doubt whether the specific use of lethal force is to be operated within the regimes of IHL or IHRL, then IHRL framework should be presumed for the purposes of using lethal force.

Similarly, with regard to the duty to investigate, the paramount importance of the right to life advocates that if there is a doubt whether the death occurred in the context of law enforcement or hostilities paradigm, the former is presumed, and an examination is conducted, during which it could be first clarified which paradigm applied at the time and, based on the conclusion, whether a full investigation is required.

One Final Note — Are We Passing on the 'Hot Potato'?

The tension between the IHL and IHRL in the discussed test case is replicated in other activities during an armed conflict, in particular in the context of prolonged occupation, such as searches, taking over a civilian building for military purposes, pursuing a civilian who previously participated in hostilities, temporary checkpoints, and possibly intelligence questioning.

The theoretical questions and the practical debate on the relationship between IHL and IHRL are far from settled. The "interchangeable applicability" approach might be a legal solution, but it is not a practical one. It requires interchanging two sets of rules in situations where they are not applied in harmony, but rather laid down as patches in a field of factual uncertainties.

Solving the legal debate by forwarding it to be factually assessed in the field, where chaos is inherent, may preserve the theoretical legal division between law enforcement and hostilities paradigms, but ultimately exacerbates their application in practice.

Jean-Paul Laborde

Application of International Humanitarian Law and International Human Rights Law in Armed Conflict

The issue of possible overlapping between International Humanitarian Law (IHL) and International Human Rights Law (IHRL) is not new, and many academic publications have already been issued on that topic. At the first glance and at the theoretical level, solutions appear to be relatively simple. While the IHL is applied during the time of war, IHRL governs at peacetime.

However, the distinction between wartime and peacetime is, nowadays, less and less clear. Especially, with the emergence of terrorist organizations acting in the same way as military forces do, situation is becoming more and more obscure. For example, in Syria or in Iraq, Daesh proceeds as if it was an army but without the status of a national armed force. In such a situation what to apply — IHRL or IHL? Is it true that targeting specific combatants that constitutes an extrajudicial killing during peacetime becomes regular means of combating an enemy at wartime? Difficult debates at the UN Security Council have taken place often with, on the one side, Member States promoting IHRL within the SC agenda and, on the other side, several other Member States being very reluctant about it and giving clear preference to IHL.

This brings to the forefront of the debate a fundamental question: shall IHRL be helpful during both wartime (and peacekeeping, once tensions are reduced), as well as post-war (peace-building and peacetime periods); actually, the debate is always very difficult in the Security Council on that matter, some countries supporting that inclusion, while others arguing that restoration of peace and security *stricto sensu* do not include the human rights agenda. In that context, it should be underlined that 173 UN Member States ratified the International Covenant on Civil and Political Rights, while 6 have signed it, and only 18 have not taken any action. It means that at the international level, the Covenant enjoys an almost universal recognition.

Furthermore, the primacy of obligation to respect human rights is even more enforced through regional judicial instances, more specifically by the

Inter-American Court of Human Rights, or the European Court of Human Rights (ECtHR). For example, obligation to respect human rights in wartime was discussed in several of their decisions. While we should insist on the universal implementation of IHRL, still, we should look at situations when vigorous adherence to IHRL may impede implementation of IHL.

Obviously, we should note that, in many cases, IHRL is complementary to IHL. For example, whenever there is no provision of IHL on issues related to trial proceedings, there is no reason not to apply IHRL (concerning the principle of fair trial, for example). In that regard, the Martens Clause, which was first incorporated into The Hague Convention of 1899, stipulates that even during the time war, "the laws of humanity and the requirements of the public conscience" protecting "populations and belligerents" continue to apply. *Jus gentium* is still applicable. That fundamental rule was reaffirmed in the jurisprudence of international courts and tribunals, including the ICJ, the ICTY, and the ICC.

Still, the essence of IHL is to protect combatants, civilians or prisoners of war in times of armed conflict, while IHRL protects individuals in their daily life. It means that contradictions could happen on the basis of those different goals. In addition, IHL organizes relations among States during a conflict between them, or between government armed forces and organized armed groups that oppose them, including liberation movements, while IHRL regulates relations between States and individuals.

It should be noted, in that context, that the two bodies of international law may be conflicting according to the means which should be used by one or the other. For example, the success of IHL in its protection role depends on discretion and neutrality which would build trust among the various actors, while IHRL is dealing with accountability and/or responsibility which is much more connected to transparency and publicity. In that context, IHL shall always be applicable. Indeed, as a matter of principle, protection deriving from IHL whenever applicable during the wartime, whether in international or non-international armed conflict, should always prevail over any other law. Also, it should be understood that IHL is more a body of law to protect civilians, or non-combatants, rather than to regulate the military actions among belligerents. Is it the case with the application of all the provisions of IHRL?

Of course, in the overall context of international criminal law principles, an individual, who is a citizen of a State which is party to a treaty, can be brought to justice in the country of origin for any penal offence committed outside of the territory of that country. That is a long-standing concept. That principle should be applied as much as it could be in a balanced way, while IHL is always applicable, since it is a protection mechanism during the armed conflict. If we look into the framework of international criminal law, we could even say that it has been a concept which existed before the establishment of jurisdiction based on territoriality of the commission of the offences.

Obviously, one should also make a clear distinction between the so-called "attribution" for which a State is designated for having committed an act of aggression, or another act which would have consequences against that State at the international level versus penal jurisdiction or penal responsibility of individuals, including Heads of States and accredited diplomats, which belongs to the competence of criminal courts and eventually international criminal tribunals. In such a context, it could also be stressed that in some judgements of the ECtHR related to the armed conflict in Iraq, in which those discussions concerning the implementation of IRHL during a conflict occurred, the issue of attribution versus jurisdiction was also examined.

In that overall context, jurisdiction of ECtHR is a little bit different. It relates to the overall responsibility of a State for a fault committed by an institution of that state. Often, those matters relate to a violation of the fair trial principles, or violations by law enforcement agencies of a specific liberty, listed in the European Convention on Human Rights (ECHR,) those violations having been committed within the territory of the given state. However, the Court has also decided that it has jurisdiction outside of the territory of a Member States for a violation of the Convention committed by a service member belonging to the armed forces of a State which is Party to that Convention.

Under that jurisprudence, if troops of a country party to the ECHR are deployed in a battlefield, even outside the territory of any Member State of the Council of Europe, ECHR would apply according to several decisions of the ECtHR. Does it mean that the concept of extraterritoriality is applicable in all situations? Actually, it could be interpreted as application of jurisdiction on the basis of "offences committed by nationals of a country

party to the Convention". However, Article 1 of the ECHR states that the Convention applies "within the jurisdiction" of the State which is Party to the Convention. Referring again to Article 1 of the ECHR, could the Convention in accordance with that provision, be applied in Iraq or Syria to nationals of states-parties to the Convention and acts committed by them?

Still, concerning the enforcement of the ECHR jurisdiction, it is a different matter, since it is connected neither to the commission of international crimes nor to the implementation of international penal law conventions. However, there might be a certain confusion between criminal liability and jurisdiction of the ECtHR outside of the territory of the State which has ratified the ECHR. The concept used by the Court to establish its jurisdiction is in connection with the fact that the violation was committed by individuals belonging to an army of a state involved in a conflict outside of the territory of that state. It looks like extraterritorial jurisdiction. That concept was used by the ECtHR to establish its jurisdiction in cases in which a State which is Party to the Convention could be declared responsible for conduct of its forces in a territory under its occupation. Still, here, we should distinguish between jurisdiction and responsibility of States and persons who committed the reprehensible actions.

While jurisdiction of the ECtHR could be admitted to judge violations of provisions of the ECHR, conflicting rules between IHL and IHRL, especially violations of one when there are concurrent violations of the other, shall be looked into very carefully.

Nevertheless, application of IHRL should never constitute an impediment to the implementation of IHL, which is part of customary law. It does not mean that provisions of ECHR are not applicable, but just that during an armed conflict, Human Rights provisions are superseded by IHL provisions, and not that IHL applies by derogation.

Actually, under such a situation, the ECtHR considers that IHL applies despite ECHR.[1] The Court said that, during an armed conflict IHRL shall be interpreted as taking full consideration of IHL.

[1] See *Hassan v. the United Kingdom*, Application no. 29750/09. See also *Varnava and Others v. Turkey*, Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90.

In that legal context, the State could refer to Article 4 of the International Covenant on Civil and Political Rights, which provides for derogation from obligations under the Covenant, or to a respective Article 15 of the ECHR. But even without referring to Article 15, the ECtHR stated that Article 5 of the Convention related to the Right to liberty and security is not applicable under certain circumstances, especially in emergency conditions connected to a war situation. For example, IHL does not oblige military authorities to notify all the rights foreseen in Article 5 when a person is arrested as it should be under normal circumstances[2], (*inter alia* arrest with a lawful order of a court on reasonable suspicion to have committed an offence, right to know the reasons of the arrest, right to be brought before a judge). Of course, there is an immense difference between rights of a prisoner of war and a person who is suspected of having committed a crime.

And the ECtHR decided in *Hassan v. the United Kingdom*[3], as well as in *Varnava and Others v. Turkey*[4] that, even if the Convention continues to

[2] 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
a. the lawful detention of a person after conviction by a competent court;
b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
2. Everyone who is arrested shall be informed promptly, in a language which he or she understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court, and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

[3] http://hudoc.echr.coe.int/eng?i=001-146501.

[4] http://hudoc.echr.coe.int/eng?i=001-94162.

apply in war time, when a member of military forces is captured according to the IHL rules, Article 5 (para. 1) does not apply. Whatever the Court says (the implementation of the Convention should be judged according to IHL principle), it means that IHL is a derogation to the implementation of the Convention. That is what is extremely debatable. IHL shall be applicable *per se*, and not by derogation, according to its place in the overall international law context.

What could the conclusion drawn from that debate be?

Human Rights are more and more part of international law connected to protection of citizens during a war, indeed. But when IHL protects even more the lives of civilians and prisoners during the war time, it should be clear to everybody that IHL should prevail.

As Albert Camus said in his speech, accepting the Nobel Prize for Literature, "Each generation doubtless feels called upon to reform the world. Mine knows that it will not reform it, but its task is perhaps even greater. It consists in preventing the world from destroying itself."[5]

[5] Albert Camus' Speech at the Nobel Banquet at the City Hall in Stockholm, December 10, 1957 (translated from French), *available at*: https://www.nobelprize.org/prizes/literature/1957/camus/speech/.

Panel 2: Application of International Humanitarian Law and International Human Rights Law by International Courts and Tribunals

Victoria Manko

The relation between the two sets of rules in the situation of an armed conflict has repeatedly become the subject of examination in international courts and tribunals. The current practice reveals challenges caused by attempts of simultaneous application of IHL and human rights law both to the integrity of these rules and to institutions seeking to apply them to armed conflicts, and in their aftermath.

For instance, we see from the practice that the case-law of the European Court of Human Rights is quite controversial. The Court attempted to resolve the issue of the relationship between international humanitarian law and the provisions of the European Convention on Human Rights in relation to the same events twice. In the cases *Al-Jedda v. the United Kingdom* and *Hassan v. the United Kingdom* it came to completely opposing outcomes.

In this regard, there are a lot of practical questions for international courts and tribunals that need to be resolved. For instance,

- How to distinguish situations of exclusive application of IHL or human rights law?
- Is it possible to apply both branches at the same time? How should the norms of these branches be applied together?
- What features should a forum competent to apply IHL possess?
- In what way (and to what degree of detail) should the facts be established in order to apply IHL rules in a correct manner? What are the standards for the evaluation of such evidence?

Panel 2 (left to right): Dieter Fleck, Peter Michael Kremer, Wenqi Zhu, Victoria Manko

Hopefully, we shall see an analysis of how different forums approach these questions. Maybe, eventually, it would even help to find some decision, common ground, or suggest recommendations for courts and tribunals on how to apply IHL and IHRL in a situation of armed conflict.

Anatoly Kovler

International Humanitarian Law and the European Convention on Human Rights: A Clear Demarcation Line is Necessary

In his lecture at the conference of the European Society of International law in October 2015, the judge of the European Court of Human Rights (ECtHR) and subsequently President of the Court, Linos-Alexandre Sicilianos has addressed the question of difficulty of full-scale application of international law in the process of making the legal decisions of the ECtHR. He concluded his thorough analysis of the problem with a confession: "The case of *Georgia v Russian Federation (II)*, currently being considered in the Grand Chamber, stands to raise a similar problem".[1] This, of course, was not the only case to do so.

In the late 1960's, the Committee of Ministers of the Council of Europe has encountered a problem of "competition" between the positions of International Human Rights Law (IHRL) and the standards of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The expert committee was founded, and by September 1970 it had prepared a report "Problems arising from the coexistence of United Nations Human Rights Covenants" with a telling subtitle "The Differences Between the Guaranteed Rights".[2] The experts have highlighted the facts of inconsistent interpretations of the same law. For instance, Article 2 (Right to Life) of the ECHR states that no one shall be deprived of his life ***intentionally***, while Article 6(1) of the International Covenant on Civil and Political Rights articulates this right differently: "No one shall be ***arbitrarily*** deprived of his life",[3] meaning it covers a completely different aspect of an attempt on somebody's life.

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[1] Sicilianos L.-A. *La Cour Européenne des droits de l'homme face à l'Europe en crise* // Conférence SEDI/ESIL, Strasbourg, 16 Octobre 2015, p. 13.

[2] Council of Europe. Problems arising from the co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights. Differences as Regards the Rights Guaranteed // Report of the Committee of Experts on Human Rights to the Committee of Ministers. H (70)7, Strasbourg, September 1970.

[3] *Ibid.,* p. 23.

The problem of correlation between the international law, the International Humanitarian Law (IHL) and that of the ECHR is still a conundrum for both specialists and judges, as evident from the resonant seminar held by judges of the ECtHR a day before the traditional opening ceremony of the judicial year on 29 January 2016: "International and national courts confronting large-scale violations of human rights. Genocide, crimes against humanity and war crimes".[4] This seminar has again raised a question of degree to which the IHL — the Law of War — is applicable in the modern IHRL, to protect civilians and combatants in specific conditions of international and non-international armed conflicts. In other words, how to align military means and needs (Law of The Hague) with protection of rights of persons affected by armed conflict (Law of Geneva). Reader would recall that Hugo Grotius pondered the same issue as early as in 1625 in his *De Jure Belli ac Pacis*.

There are some legal experts who find it evident that there exists a certain connection between the IHL and the IHRL, which the ECHR is a part of. Otherwise, there would be a risk of the international law as a whole becoming fragmented.[5] Others, in contrast, caution neglect of the fact that the IHRL is unconditionally based on the humanitarian principles, while the IHL is a compromise between the humanitarian principles and the military necessity.[6] It seems that such dilemma is arbitrary, since international law includes both of these aspects, each with its own specifics. This raises a question: where is the demarcation line drawn between the two branches of international law? This issue is far from being idle, since, as one author noted: "the rule according to which the special law derogates the general (*lex specialis derogat generali*)

[4] International and national courts confronting large-scale violations on human rights. Genocide, crimes against humanity and war crimes. Strasbourg, 29 January 2016.

[5] *See* expert group report (*Koskenniemi Report*): UN International Law Commission. *Fragmentation du droit international: difficultés découlant de la diversification et de l'expansion du droit international*. 2006 // UN.doc. A/CN/L.682. 256 p.

[6] Gasser H.-P. International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion? // *German Yearbook of International Law*. 2002, p. 161–162.

is frequently used to avoid exercising the international law".[7] The same author questions to which degree the legal propositions of the ECtHR carry a risk of further fragmentation of the international law. In support of his concerns he states, that the ECtHR has been viewing the ECHR as *lex specialis*, a "special" agreement which does not need to comply with the classic characteristics of the treaty law.

One of the main examples for this is the Judgment in the case of *Wemhoff v. Germany*,[8] in which the ECHR is explicitly qualified as a "*law-making treaty*". Furthermore, the ECtHR has implicitly suggested that the ECHR may create regional obligations approaching *erga omnes*.[9]

There is an inverse relation that should be considered: "The Convention encompasses an extensive array of human rights. Its provisions are often vague and general, which naturally prompts the need on the part of the Court and the Commission to develop them. In this context, it was often necessary for the Strasbourg bodies to use international instruments, as they were more specific and provided more guidance than the Convention".[10] As

[7] Vanneste F. *Droit international général et droit international des droits de l'homme: l'apport de la Cour européenne des droits de l'homme // Revue trimestrielle des droits de l'homme*, Octobre 2011. No. 88.

[8] ECtHR, *Wemhoff v. Germany*, Application no. 2122/64, § 8.

[9] Consider this observation made by the ECtHR: "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'. By virtue of Article 24 (art. 24), the Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals" — ECtHR, *Ireland v. The United Kingdom*, Application no. 5310/71, § 239.

[10] Forowicz M., The Reception of International Law in the European Court of Human Rights, Oxford, 2010, pp. 361–362. *See also* Krasikov D.V., "'Skrytaya rol" norm obshchego mezhdunarodnogo prava v regulirovanii kompetentzii Evropeyskogo Suda po Pravam Chelveka ["Hidden role" of general international law norms in regulation of European Court of Human Rights competence] // Rossiyskiy Yuridicheskiy Zhurnal [Russian Juridical Journal] 2013, No. 3, pp. 48–45; A.I. Kovler, Evropeyskaya Konventziya v mezhdunarodnoy sisteme zashchity prav cheloveka [European Convention in the International System of Human Rights Protection], Moscow: Norma, 2019, discussed in Chapter I.

will be illustrated below, such "adoptions" become more frequent in the practice of the ECtHR. The question is, whether they are justified in each particular case when considering increasingly boundless Court case-law which can be used to draw almost anything.

Moreover, there is a concept based on the ECtHR's rulings, describing the Convention as a "constitutional instrument of European public order".[11] A beautiful legend of the "European Constitution" has gained certain popularity due to the failure of the project to adopt the Constitution for Europe in 2005. The Charter of Fundamental Rights of the European Union, adopted in 2000, would have become a basis for this constitution. After it failed, there was a project of European Union accession to the Convention (going as far as making a corresponding entry into Article 59 of the Convention). This was not, however, finalized due to the hard position of the ECtHR of Justice. Recently, A. Nussberger, then Vice-President of the ECtHR, gave an unambiguous answer to the question whether the Convention has turned into a constitution: "No, ECHR is not a constitution",[12] having added that she accepts the term "shadow constitution".[13]

We have touched upon those issues to illustrate that the Convention status is a point of controversy among lawyers, researches, as well as judges themselves. Even more controversial is the question of full-scope IHL application by regional human rights courts: European, Inter-American and African.[14] Let's dwell on this topic in more detail.

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[11] ECtHR, *Loizidou v. Turkey* (Preliminary Objections), Application no. 15318/89, § 75; *see also* ECtHR, *Cyprus v. Turkey*, Application no. 25781/94, § 78, and ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, § 156.

[12] A. Nussberger, Evropeyskaya konventziya o zashchite prav cheloveka i osnovnykh svobod — Konstitutziya dlya Evropy? [The European Convention for the Protection of Human Rights and Fundamental Freedoms — a Constitution for Europe?] // Mezhdunarodnoye Pravosudiye [International Justice], 2019, No. 2, p. 11.

[13] *Ibid*., p. 15.

[14] Gnatovskyy N., Mezhdunarodnoye gumanitarnoye parvo: naskol'ro ogranicheny v ozmoznosti mezhdunarodnogo pravosydiya? [International Humanitarian Law: How Limited are the International Justice Opportunities?] // Mezhdunarodnoye pravosudiye, 2013. No. 2. *See also* M.L. Galperin, Ya.Yu. Borisova, Evropeyskaya konventziya o pravakh cheloveka — parvo voyny? [European Convention on Human Rights — the Law of War?] // Zakon [The Law], 2019, No. 6, p. 105–111.

First of all, let us examine the nature and the intended purpose of two branches of international law: the IHL and the IHRL in the European version of the latter. The International Court of Justice, in its two widely-known advisory opinions and one judgment, has drawn a distinct line between these two branches of international law, while noting that they may not *stricto sensu* have a claim for autonomy.[15]

It should be specified straight away that the protection of human rights in the situation of military conflicts is no longer exclusive to IHL, as was true at the time of adoption of the Hague Conventions of 1899 and 1907, with F.F. Martens at the helm.[16] Adoption of the Geneva conventions in 1949, and of two Additional Protocols in 1977 has significantly saturated the "Law of War" (more specifically, the law of waging a war) by including a massive amount of rights providing protection and wardship to helpless persons not taking part in the combat, or to the wounded combatants. It was the "Law of Geneva" IHL that was accepted by the ECtHR. This is illustrated by the ECtHR Factsheet on Armed Conflict[17] describing a substantial case-law of the Court. In other words, ECtHR's view of the International Humanitarian Law in its "Geneva" version as a "human rights law applied in armed conflicts"[18] has become an established tradition. There is a paradox though:

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[15] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, § 25: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136, §§ 102–106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, §§ 217–219. *See also* Zyberi G., The Humanitarian Face of the International Court of Justice. Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles, Antwerpen: Intersentia, 2008.

[16] *See* A.S. Capto, Pravo voyny [Law of War] // Pravo I politika [Law and Politics], 2001, No. 1. *See also* V.N. Rusinova, Prava cheloveka v vooruzhennykh konfliktakh: problem sootnosheniya norm mezhdunarodnogo gumanitarnogo prava I mezhdunarodnogo prava prav cheloveka [Human Rights in Armed Conflicts: Problem of the Correspondence of the Norms of International Humanitarian Law and International Human Rights Law], Moscow: Statut, 2015.

[17] ECtHR Factsheet — Armed Conflicts, *available at*: https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf.

[18] Pictet J., *Le droit humanitaire et la protection des victimes de la guerre*. Sijthoff — Institut Henry-Dunant, 1973. According to the opinion of T. Meron, this concerns "humanization of the Law of War". *See* Meron T., The Humanization of International Law. Leiden: Martinus Nijhoff, 2006, discussed at pp. 1–89.

an adverse effect of the Convention law on an international law is a frequent subject of doubts among specialists. For instance, N. Gnatovskyy makes the following conclusion: "While a practical aspect of IHL implementation by the Human Rights Courts may be a cause for some optimism, their contribution into development and better understanding of the provisions of this branch of the international law is quite dubious."[19] Such skepticism, according to T. Meron, is caused by judges lacking in deep knowledge of the "law of war", thus they reach conclusions that humanitarian law experts find questionable. Although, as T. Meron adds, "Their very idealism and naiveté are, however, their greatest strength",[20] since it gives a stronger pro-human rights orientation to both IHL and the Convention law. This seems to be a questionable logical route for the famous specialist to take. For previously, quite conversely, he defended the specificity of IHL and warned against the danger of its banalization.[21]

So, when is the ECtHR going to turn towards the IHL? There is an interesting article authored by the then President of the ECtHR J.-P. Costa and the Deputy Registrar of the Court M. O'Boyle describing the evolution of the Court's relationship with the IHL.[22] In their opinion, the examples of early cautious reference to the IHL were exclusive to the cases considering the internment of persons in armed conflict, deprivation of life during military operations or during application of retroactive effect of the law in regard to crimes against humanity. However, in these cases it stands to note that the state had and still has an instrument to sidestep keeping up with its obligations in emergency. Article 15 of the ECHR leaves this opening to "in time of war or other public emergency threatening the life of the nation" (1), as well as "deaths resulting from lawful acts of war" (2) provisions in the spirit of the "law of war". Additionally, if none of such exceptions are present, actions of the state fall into regular legal framework, as seen during consideration of so-called "Chechnya Cases": the ECtHR has clearly

[19] Gnatovskyy N., *op. cit.*, p. 72.

[20] Meron T., *op. cit.*, p. 8.

[21] Meron T., International Criminalization of Internal Atrocities. // *American Journal of International Law* 1995, Vol. 89, p. 554 *et seq.*

[22] Costa J.-P., M. O'Boyle, The European Court of Human Rights and International Humanitarian Law // *La Convention européenne des droits de l'homme, un instrument vivant. Mélanges en l'honneur de Christos Rozakis*, Bruxelles: Bruyant, 2011, p. 107–129.

indicated to Russian authorities that without making a "war exception", they were to answer for their actions according to peacetime laws: "No martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention… The operation in question therefore has to be judged against a normal legal background").[23] L.-A. Sicilianos has made the following comment: "In other words, the ECtHR has almost abstracted itself from the war context to view the deaths of the victims against the law used in peace times. This approach may seem strange. However, there is nothing strange about this, considering the fact that both sides have based their arguments on Convention exclusively, while completely ignoring the IHL."[24] While this judgment is harsh, there is no disputing it is a just one.

On the contrary, considering another application in similar context, the ECtHR has not taken into consideration the appeal filed by the applicant party attorneys to Common Article 3 of the Geneva Conventions, since the defendant state has been basing its position on Article 2 of the Convention, thus the Court did not consider it necessary to apply the IHL.[25] To paint a full picture, let us note that in a series of so-called "Kurdish" applications against Turkey, the ECtHR has shown a demonstrative restraint regarding non-international armed conflicts and has based its analysis solely on the ECHR provisions, even though Turkish authorities have appealed to Article 15 on derogation in times of war.[26] In *Ilascu*,[27] the ECtHR has completely lost itself while searching for "jurisdiction" and "responsibility" of Russia in Transnistria, to the extent that it "forgot" to apply provisions of the Fourth Geneva Convention to its analysis of the non-international armed conflict. Such restraint of the ECtHR towards the application of IHL provisions

[23] This phrase was first used in *Isayeva v. Russia*, no. 57950/00, § 191, and has been repeatedly evoked in other similar cases.

[24] Sicilianos L.-A., *L'Articulation entre droit international humanitaire et droits de l'homme dans la jurisprudence de la Cour européenne des droits de l'homme* // Swiss Review of International and European Law, Vol. 27 (2017), No. 1, p. 6.

[25] *See* ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Applications nos.5 7947/00, 57948/00 and 57949/00, §§ 157, 160, 168.

[26] *See, for example* ECtHR, *Aksoy v. Turkey*, Application no. 21987/93, § 67; ECtHR, *Kaya v. Turkey*, Application no. 22729/93, §§ 86–92; ECtHR, *Kanlibas v. Turkey*, Application no. 32444/96, §§ 39–51.

[27] *See* ECtHR, *Ilascu and Others v. Moldova and Russia* [GC], Application no. 48787/99.

even in armed conflict situations, be it international or internal, may be explained with reasonable caution and diligence to keep the Pandora's box closed and judicial activism limited.

Still, from mid-2000s, the ECtHR begins to pay attention to the IHL, especially in the cases of international conflict like on Cyprus. In *Varnava and Others v. Turkey*, concerning persons gone missing during military action on Cyprus in 1974, the Court's position is quite clear: "Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict."[28] In this case, ECtHR strove to demonstrate that IHL provisions correlate to and are compatible with the provisions of the Convention. According to the position of the ECtHR, the alignment of the provisions is important in the cases, when it concerns not only the protection of people's lives, but also the efficiency of investigation of right to life violations during the military operations. It will not be a large exaggeration to state that harmony between provisions of IHL and the ECHR is achieved when it concerns protection of life during military conflicts with expressed violence against the civilian population. However, the ECtHR also has to consider cases where the legal consequences of some actions of parties to an armed conflict are not so transparent, and achieving this harmony is difficult, save for resorting to logical maneuvering and truisms.

The most vulnerable to critics are legal positions of the ECtHR on punishment for war crimes or for actions, qualified by national courts as such.

As early as in *X v. Belgium* (the applicant had complained about being denied a disability pension due to 1945 conviction for collaboration with the forces of Nazi Germany) the European Commission on Human Rights in its decision dated 20 July 1957 ruled as follows regarding Article 7(2) of the ECHR[29]: "From the works carried out for drawing up the Convention, it

[28] *See* ECtHR, *Varnava and Others v. Turkey*, Application no. 16064/90 and 8 other applications, § 185.

[29] "This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations".

follows that point 2 of Article 7 of Convention had a goal of clarifying that the Article does not affect the laws which have been adopted in exceptional conditions after the end of Second World War with the goal of punishing war crimes and cases of treason and collaboration with the enemy, which is why there is no discussion about any legal or moral condemnation of these laws whatsoever".[30] Which means that referring to Article 7(2) of the ECHR was enough to declare the application inadmissible.

Starting from early 2000's, the "new" Court, now operating on the permanent basis, has rendered several judgments and decisions in regards to war crimes and crimes against humanity using IHL provisions. As such, in the case of ex-leaders of the GDR, who were found guilty by unified Germany of giving orders to open fire on people crossing the Berlin Wall, the ECtHR has deemed itself compelled to view the case from the point of view of IHRL, since that was what the German courts had done.[31] However, in *Kolk and Kislyiy v. Estonia* (admissibility decision in a case about deportation of thousands of Estonians to remote regions of the Soviet Union), the ECtHR, in addition to speculation about "Soviet oppression", has voiced a thought that taking part in the deportation falls within the scope of the IHL provisions on crimes against humanity with no statutory limitations.[32] Such "bold" interpretation of the Geneva Conventions has surprised a pedigreed international law expert, the past President of the International Criminal Tribunal for the former Yugoslavia, Antonio Cassese, who didn't consider principles of international law alone to be sufficient to charge someone with crimes against humanity.[33]

The ECtHR had to conduct a deeper and, notably, less politically motivated analysis of the Geneva Convention provisions, particularly, in defining crime against humanity, which, in the case of *Korbely v. Hungary*

[30] European Commission on Human Rights, *X v. Belgium*, Application no. 268/57.

[31] ECtHR, *Streletz, Kessler and Krenz v. Germany* [GC], Applications nos. 34044/96, 35532/97, 44801/98, § 90.

[32] ECtHR, *Kolk and Kislyiy v. Estonia*, Applications nos. 23052/04 and 24018/04 (admissibility).

[33] Cassese A., Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law: The *Kolk and Kislyiy v. Estonia* Case Before the ECHR // *Journal of International Criminal Justice*, 2006, No. 6, p. 416.

(participation in the quelling of a riot during the 1956 uprising in Hungary), lead to judging that national courts applied the law retrospectively and, therefore, violated Article 7 of the Convention.[34]

While in *Korbely* the ECtHR has taken into consideration all nuances of qualification acts committed in the context of a non-international armed conflict, in *Kononov v. Latvia*[35] (case about applicant's participation in reprisals against the villagers who turned in Soviet partisans to the forces of Nazi Germany in 1944), the political motivation took precedence over the legal one.[36] The judgment has invited harsh reaction not only from the then President of the ECtHR J.-P. Costa and two judges, expressing joint separate opinion, but also caused diatribes from experts in the case-law of the ECtHR, where the mildest of rebukes was the "unpredictability" of Court's legal positions.[37]

The proof of "inconsistency" of the ECtHR positions on similar cases may be found in the Grand Chamber Judgments in *Marguš v. Croatia*,[38] *Maktouf and Damjanović v. Bosnia and Herzegovina*,[39] and more recently in *Vasiliauskas v. Lithuania*,[40] where the ECtHR has made an abrupt turnaround on its position in *Kononov*, although the bench was split, and the bulk of separate opinions on these cases has by far exceeded the size of judgments themselves. This indicates the inconsistency of the Court's basic positions on the entire scope of the Convention and the IHL provisions intersection problems.

Paradoxically, three quarters of a century after the end of the World War II, the ECtHR has to consider cases on armed conflicts in Northern Cyprus, Transnistria, Nagorno-Karabakh, former Yugoslavia, Abkhazia and South

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[34] ECtHR, *Korbely v. Hungary* [GC], Application no. 9174/02.

[35] ECtHR, *Kononov v. Latvia* [GC], Application no. 36376/04.

[36] *See analysis of this case in* Kovler A.I., Posle "Kononova" [After *Kononov*] // Prava cheloveka. Praktika Evropeyskogo suda po pravam cheloveka [Human Rights. Case-law of the European Court of Human Rights], 2010, No. 9, p. 6–46.

[37] Decaux E., *De l'imprévisibilité de la jurisprudence européenne en matière de droit humanitaire // Revue trimestrielle des droits de l'homme*, Avril 2011, No. 86, p. 344.

[38] ECtHR, *Marguš v. Croatia* [GC], Application no. 4455/10.

[39] ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], Applications nos. 2312/08 and 34179/08.

[40] ECtHR, *Vasiliauskas v. Lithuania* [GC], Application no. 35343/05.

Ossetia, and now Donbass. However, while the ECtHR frequently refers to IHL in cases of individuals convicted for war crimes in context of Article 7 of the Convention, it is less enthusiastic to invoke the IHL in cases relating to direct aftermath of military action. It does not necessarily ignore the IHL, but it does not give it top priority in its decision making. This can be observed in two "mirror" Grand Chamber judgments with facts based on events in Nagorno-Karabakh: *Sargsyan v. Azerbaijan*[41] and *Chiragov and Others v. Armenia*.[42] Despite considering the position of applicants from the IHL position (civilian relocation, deportation, right to return to their homes, etc.), the ECtHR concluded that the IHL "does not appear to provide a conclusive answer" to questions raised by the applicant,[43] and went into defining violations of Article 8 and 13 of the Convention and Article 1 of the Protocol No. 1 to the Convention.

It is even more surprising, considering that several months earlier, in *Hassan v. The United Kingdom*,[44] the ECtHR Grand Chamber cited the Fourth Geneva Convention in its argumentation to their fullest. The case was about the events of arrest and detainment of the applicant's brother Tarek Hassan in Iraqi camp by British and American troops in April 2003. While released in several days, T. Hassan was found dead four months later. The applicant insisted that T. Hassan's detainment was illegal since internment due to security concerns was not listed in provisions of Article 5(1-4) of the Convention as a legitimate justification, therefore it was extrajudicial. All the while, the United Kingdom authorities made no statements of derogation set in Article 15 of the Convention. At the same time, the Third and the Fourth Geneva conventions concede internment in case of military necessity.

Finally, the ECtHR, as if apologizing for its harsh position towards justifications for deprivation of liberty shown in previous cases, in particular in case of *Al-Jedda v. United Kingdom*,[45] makes a stunning conclusion that "the lack of formal derogation under Article 15 "does not

[41] ECtHR, *Sargsyan v. Azerbaijan* [GC], Application no. 40167/06.
[42] ECtHR, *Chiragov and Others v. Armenia* [GC], Application no. 13216/05
[43] *See supra Sargsyan v. Azerbaijan* [GC], § 232; *Chiragov and Others v. Armenia* [GC], § 97.
[44] ECtHR, *Hassan v. United Kingdom* [GC], Application no. 29750/09.
[45] ECtHR, *Al-Jedda v. United Kingdom* [GC], Application no. 27021/08.

prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case",[46] and finally ruled that Article 5 of the Convention had not been violated. Thus, should one have chosen to justify the non-application of Article 5 of the Convention, it should be sufficient to refer to a less strict provision of the IHL. As justifiably noted by the four judges who voted against this conclusion, by doing so, the ECtHR has significantly lowered the bar for protection against illegal deprivation of liberty. In their opinion, the ECtHR as a tribunal does not have a legal instrument to resolve an issue of possible conflict between the IHL and the ECHR law. The ECtHR's role, in the opinion of these judges, is in giving the Convention the priority, while estimating its own role according to provisions of Article 19 of the Convention, namely "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". In this regard, a comment by V.N. Rusinova is fair: "Case of *Hassan v. the United Kingdom*, will indubitably come down in history as a striking example of interpretation that changes the subject matter of a law to one directly opposite to its letter".[47]

Of course, such "landmark decision" may be explained with tried and tested evolutionary interpretation of Convention, but even that method has its limits.[48]

In his monograph on evolutionary interpretation of treaties,[49] Professor E. Bjorge asks a logical question: does such interpretation always benefit

[46] *See supra Hassan v. United Kingdom* [GC], § 103.

[47] Rusinova V.N., Hassan protiv Velikobritanii: ot Konventzii k mezhdunarodnomu gumanitarnomu pravu I nemnogo obratno [*Hassan v. the United Kingdom*: from Convention to the International Humanitarian Law and a Little Bit Back]// Mezhdunarodnoye pravosudiye [International Justice], 2015, No. 3, p. 33

[48] Kovler A.I., Evolutivmoye tolkovaniye Evropeyskoy Konventzii po pravam cheloveka: Vozmozhnosti I Predely. Evtopeyskiy sud po pravam cheloveka kak sub'yekt tolkovaniya prava [Evolutive Interpretation of the European Convention on Human Rights: Possibilities and Limits. The European Court of Human Rights as a Subject of Interpretation of Law] // Zhurnal zarubezhnogo zakonodatel'stva I sravnitel'nogo pravovedeniya [Journal of Foreign Legislation and Comparative Law], 2016, No. 3, p. 92–100.

[49] Bjorge E., The Evolutionary Interpretation of Treaties. OUP, 2014.

human rights protection, since sometimes such legal interpretations may kill the living fabric of the method itself?

Applying to the ECtHR the ICJ's *dicta* , that "it is the duty of the Court to interpret, not to revise the Convention",[50] E. Bjorge opines that "the real danger for the development of the interpretation of the Convention lies in *contra legem* interpretations such as the one the Strasbourg Court made in *Hassan*…".[51] Generally, this concerns avoiding abusing the law in the sense described in Articles 17 and 18 of the Convention.

The fact that there exists a concern of a possible blurring of the Convention legal framework due to expansion of some branches of international law is confirmed by initiative of the Committee of Ministers of the Council of Europe to create a special drafting group to prepare a report on place of the Convention in European and International legal order.[52] (Let us remember that a similar initiative was attempted in late 1960s in view of adoption of international human rights treaties.)

This drafting group operates within the framework of the Committee of Experts on the System of the European Convention (DH-SYSC), which mostly focuses on reforming of the Convention system.

The first meeting of DH-SYSC-II took place on 29-31 March 2017. The priority questions (themes) were defined for further discussion. Among others, issues of interactions were brought up between the Convention and:

- other branches of international law, including international customary law;
- other international human rights instruments to which the member States of the Council of Europe are parties;
- EU legal order, and other regional organizations.

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[50] As cited in Bjorge E., The Convention as a Living Instrument: Rooted in the Past, Looking to the Future // *Human Rights Law Journal*. 2016. Vol. 36, p. 255.

[51] *Ibid*.

[52] Committee of experts on the System of the European Convention on Human Rights (DH-SYSC). Drafting group II on the follow-up to the CDDH Report on the long-term future of the Convention (DH-SYSC–II). Prof. A.S. Ispolinov and Prof. A.I. Kovler are experts included in the group from Russian side.

It stresses that in the priorities in former theme discussion will be:

- methodology of interpretation by the ECtHR;
- the notions of jurisdiction, in the sense of Article 1 of the ECHR, and of responsibility (including the questions relating to effective control);
- interaction between the resolutions of the Security Council and the ECHR;
- interaction between the ECHR and international humanitarian law.

By June 2019, the Group has prepared a draft of the report on the place of the ECHR in European and International legal order,[53] the final edition of which was approved in November 2019.[54]

It is intriguing whether the ECtHR judges will take the report findings into consideration when making a Judgment on an inter-state case of *Georgia v. Russia (II)* and others.

It should be underscored that in the aforementioned case of *Hassan v. United Kingdom*, which became a turning point in the case-law of the ECtHR, the position of the United Kingdom authorities seems quite logical. Firstly, the Convention provisions cannot be applied extraterritorially during active military operations in international armed conflict. Secondly, assuming the Convention applies in these conditions, it stands to take into account the provisions of the IHL as *lex specialis* as well. Thirdly, taking into consideration of the IHL special status as *lex specialis*, its provisions affect the interpretation of the Convention provisions and even precede over them in some cases. In other words, the judges of the ECtHR should draw a clear demarcation line between the ECHR law and the IHL and, *pari passu*, sort out between themselves their position in regards to so-called effective control of states over external territories.

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[53] Preliminary draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order — DH-SYSC-II (2019)41.

[54] CDDH Report on the place of the European Convention on Human Rights in the European and international legal order. Adopted by the CDDH at its 92nd meeting (26–29 November 2019). CDDH(2019)R92 Addendum1, 29/11/2019.

The author deliberately avoids discussing this issue here, having had spoken up his mind in full in his separate opinion *Ilaşcu* back in 2004.[55] Unfortunately, my concerns over the selective approach to the criteria of so-called "effective control" and inconsistency between the territorial and extraterritorial principles hold true to this day. Although, as a universally known French saying goes: *qui vivra verra* (the time will tell)..

[55] ECtHR, *Ilaşcu and Others v. Moldova and Russia* [GC], Application no. 48787/99, Dissenting opinion of Judge Kovler at pp. 142-157.

Wenqi Zhu

Contribution by the Ad Hoc International Criminal Tribunals to the Development of IHL

This year marks the 70th anniversary of the Geneva Conventions of 1949, and it is also the right time to review some of the contribution that the ICTY and the ICTR have made to the development of international humanitarian law.

Legality of the ICTY

First of all, it is the legality issue of the ICTY.

It is the UN Security Council that established the International Criminal Tribunal for the Former Yugoslavia (the ICTY) in 1993, under Chapter VII of the United Nations Charter, for the mandate to prosecute persons responsible for serious violation of international humanitarian law committed in the territory of the former Yugoslavia since 1991. However, in the first case of *Tadic* before that tribunal, the Defence challenged the legality of the ICTY by saying that the Tribunal is invalid under the Charter of the United Nations, or that it is not duly established by law, as the UN Charter does not offer any authority to the Security Council for setting up such judicial organs.

Well, can such argument stand before the Tribunal? To answer this question, one has to look into the power of the Security Council as being defined in Chapter VII of the United Nations Charter.

Article 39, the first article in Chapter VII, provides that "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".

It follows that once the Security Council determines that a particular situation poses a threat to the peace, it enjoys a wide margin of discretion in choosing the course of action. In the words of Article 39, it would then

"decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security".

Then, Article 41 provides: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations."

What the Defence argues is that the measures here do not indicate any judicial means. Nevertheless, it is evident that the wording of "may include" indicates that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All Article 41 requires that they do not involve "the use of force". It is a negative definition.

As a matter of fact, Article 39 leaves the choice of means and their evaluation to the Security Council which enjoys wide discretionary powers in this regard, as such choice may involve political evaluation of highly complex and dynamic situations. It is just for that reason that the Appeals Chamber of the ICTY considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the United Nations Charter.

"Grave Breaches"

The ICTY was set up by the UN Security Council by adoption of Resolution 808 in 1993, in which the ICTY has the mandate to prosecute persons responsible for serious violation of international law committed in the territory of the former Yugoslavia since 1991. With this as background, it is required by the principle *nullum crimen sine lege* that the ICTY has to apply rules of international humanitarian law which are, beyond any doubt, part of customary law so as to avoid the possible problem of adherence.

The four Geneva Conventions of 1949 provided the core of the customary law applicable in international armed conflict. They regulate the conduct of war from the humanitarian perspective by protecting certain categories of

persons: namely, wounded and sick members of armed forces in the field; wounded and shipwrecked members of armed forces at sea; prisons of war and civilians in time of armed conflicts. Each of these four conventions contains a provision listing some particularly serious violations as "grave breaches", such as "willful killing", "torture or inhuman treatment, including biological experiments", and "willfully causing great suffering or serious injury to body or health", etc.

The lists of grave breaches contained in the four Geneva Conventions are reproduced in Article 2 of the ICTY Statute. Therefore, the International Criminal Tribunal has the power to prosecute those persons who committed, or ordered to be committed, grave breaches of the four Geneva Conventions of 1949. As a matter of fact, this is the first time that the "Grave Breaches" were incorporated into the Statute of an international criminal institute and were clearly defined as very serious war crimes to be punished.

Violations of Common Article 3 and Additional Protocol II

The International Criminal Tribunal for Rwanda (the ICTR) was also set up by the UN Security Council in 1994. In accordance with Article 4 of its Statute, the ICTR has the power to prosecute those persons who committed, or ordered to be committed, serious violations of Article 3 common to the four Geneva Conventions of 1949. This is another important development of international humanitarian law.

The four Geneva Conventions of 1949 and its 1977 Additional Protocol I are considered to be applied to international armed conflict, whereas Article 3 common to the Geneva Conventions extends a minimum threshold of humanitarian protection as well to all persons affected by a non-international armed conflict, a protection which was further enhanced in the Additional Protocol II of 1977. Therefore, a clear distinction is made in the field of international humanitarian law as to the thresholds of application of the rules of law between situations of international armed conflicts, in which the law of armed conflicts is applicable as a whole, and situations of non-international (internal) armed conflicts where only Common Article 3 and Additional Protocol II are applicable.

It is unusual to incorporate Common Article 3 and Additional Protocol II as punishable war crimes into the Statute of an international criminal

institute. When delimiting the subject-matter jurisdiction of the ICTR, the UN Security Council was in the view that violations of international humanitarian law may be committed in the context of both an international and internal armed conflicts. The Security Council stated that:

> "Given the nature of the conflict as non-international in character, the Council has incorporated within the subject-matter jurisdiction of the Tribunal violations of international humanitarian law which may either be committed in both international and internal armed conflict, such as the crime of genocide and crimes again humanity, or may be committed only in internal armed conflicts, such as violations of article 3 common to the four Geneva Conventions, as more fully elaborated in Article 4 of Additional Protocol II.
>
> In that later respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslavia tribunal, and included within the subject-matter jurisdiction of the Rwanda tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statue, accordingly, includes violations of Additional Protocol II, which as a whole, has not yet been universally recognized as part of customary international law, for the first time criminalizes common article 3 of the four Geneva Conventions."

Additional Protocol II of 1977 as a whole is not universally recognized as part of customary international law. However, Article 4(2) of Additional Protocol II, in the context of the ICTR, is regarded as Fundamental Guarantees. All of these guarantees, as enumerated in Article 4 reaffirm and supplement Common Article 3, and they, at the time of the events alleged in 1994, form part of the existing international customary law.

Nature of the Armed Conflicts for Applying the 1949 Geneva Conventions

Whether the Geneva Conventions of 1949 can be applied in an internal armed conflict is one of the points that the ICTY extensively discussed in its first case of *Tadic*.

The grave breaches system of the Geneva Conventions enumerates the offences that are regarded so serious as to constitute "grave breaches". Being a Contracting Party to the Geneva Conventions of 1949, the State has obligation to try or to extradite the persons who are allegedly responsible for "grave breaches". However, it appears that international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. Obviously, State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts.

When reading Article 2 as a whole, it is clear that that the offences listed under that article can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Geneva Conventions themselves. The reference to the notion of "protected persons or property" has to be referred in the relevant provisions of these four Conventions that apply to persons or projects protected only to the extent that they are caught up in an international armed conflict. By contract, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions of 1949.

It is mostly because of this reasoning that in the Report of the UN Secretary General, while introducing and explaining the meaning and purport of Article 2 in regard to the "grave breaches" system, reference was made to "international armed conflict".[1] Therefore, the Appeals Chamber ruled in the *Tadic* case that "Article 2 of the Statute only applies to offences committed within the context of international armed conflicts".[2]

So, the points illustrated above are just some examples to show how the practice of the UN Ad Hoc International Tribunal has contributed to the development of international humanitarian law.

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[1] Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 37.

[2] ICTY, *Prosecutor v. Dusko Tadić.* (Case No. IT-94-1-T). Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 84.

Peter M. Kremer

Applying IHL and the ECHR in NIACs: A Challenge for the European Court of Human Rights

Introduction

Recent decisions by the European Court of Human Rights (ECtHR) on the application of the European Convention on Human Rights (ECHR) to cases involving armed conflict show a more explicit use of international humanitarian law (IHL) in its reasoning. *Hassan v. United Kingdom* was "the first case in which a respondent State … requested the Court to disapply its obligations under Article 5 or in some way to interpret them in the light of powers of detention available to it under international humanitarian law." [1]

Prior to *Hassan,* the ECtHR had avoided applying IHL in armed conflict cases by using a "self-contained" approach to decide cases on a domestic law enforcement basis. For example, in *Ergi v. Turkey*, *Isayeva v. Russia* and *Finogenov and Others v. Russia*, the Court acknowledged the state of armed conflict, but nevertheless applied human rights norms under Article 2 ECHR as if the police, military or security actions were part of domestic law enforcement operations.[2] The Court did not expressly use IHL in its reasoning in these cases although it implicitly recognized and valued IHL in applying HR norms. In each of the three cases, the Court used the specific language of Article 57 of Additional Protocol I of the 1949 Geneva Conventions to define the "feasible precautions in the choice of means and methods to avoid or minimize the loss of civilian life in security operations".[3]

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[1] *Hassan v. United Kingdom*, Judgment of 16 September 2014, ECtHR [GC] (hereinafter referred to in the text as "*Hassan*"), at para 99.

[2] *Ergi v.Turkey*, 31 EHRR (1998) 388 ECtHR. *Isayeva v. Russia*, 41 EHRR (2005) 38 ECtHR. *Finogenov and Others v. Russia*, ECHR 2234 (2011) ECtHR. The cases also show that the Court will not undertake the analysis of the nature of the armed conflict without the assent of the state party.

[3] *Ergi v. Turkey*, *Ibid.,* para 79. *Isayeva v. Russia*, *Ibid.,* para 175. *Finogenov and Others v. Russia*, *Ibid.,* para 208.

In *Al-Jedda v. United Kingdom*[4] and *Al Skeini v. United Kingdom*[5] the Court decided that the ECHR applied to extraterritorial military action, namely, the UK's military involvement in the invasion, occupation and subsequent United Nations Security Council (UNSC) sanctioned activities in Iraq. In both judgments, the Court made specific reference to IHL provisions relating to international armed conflict (IAC). In *Al-Jedda*, the Court avoided using IHL to determine the nature and classification of the armed conflict in deciding if there had been an ECHR breach. *Al Skeini* concerned the duty to investigate under Article 2 ECHR and the interplay between IHL and ECHR was not a factor.

Although the armed conflict during Al-Jedda's detention by UK forces for imperative reasons of security was classifiable as a non-international armed conflict (NIAC) under IHL, the ECtHR never classified it as such.[6] The Court extensively quoted Articles 42 and 43 of the Hague Regulations,[7] Articles 4, 27, 41, 42, 43, 64, 78 of the Fourth Geneva Convention [8] and Article 75(3) of Additional Protocol I,[9] but never explained how these IHL provisions relating to IAC factored in its decision. Moreover, the Judgment contains very little detail or discussion about the facts surrounding Al-Jedda's lengthy detention. Al-Jedda was taken into custody and detained after the initial attack and takeover of Iraq was over and following the end of occupation by the Coalition Multinational Force (CMF). To make a proper

[4] *Al-Jedda v. United Kingdom,* Judgment of July 7, 2011 ECtHR [GC] (hereinafter referred to in the text as "*Al-Jedda*").

[5] *Al Skeini and Others v. United Kingdom*, Judgment of July 7, 2011 ECtHR [GC] (hereinafter referred to in the text as "*Al Skeini*").

[6] Given that Al-Jedda was arrested on 10 October 2004 and the occupation had ended 28 June 2004, an IAC no longer existed. If an armed conflict existed in fact between Al-Jedda's arrest on 10 October 2004 and his release on 30 December 2007, it was a NIAC. The only IHL references in *Al-Jedda v. United Kingdom, supra* note 4, concerned IAC.

[7] Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, ("the Hague Regulations"). See *Al-Jedda v. United Kingdom, supra* note 4, para 42.

[8] The Convention IV relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. See *Al-Jedda v. United Kingdom, supra* note 4, para 43.

[9] The Addition Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977. See *Al-Jedda v. United Kingdom, supra* note 4, para 43.

determination as to the co-application of IHL and ECHR in this case, the Court should have made a preliminary determination of the nature and classification of the armed conflict and the role played by the UK forces in Iraq, including in Al-Jedda's detention during the UNSC sanctioned activities. Only then could the Court evaluate the lawfulness of Al-Jedda's detention.

In *Al-Jedda*, the ECtHR chose a different route to justify applying the ECHR. The Court decided the case based on whether the UK's obligations under United Nations Security Council Resolution (UNSCR) 1546 conflicted with its obligations under Art 5(1) ECHR.[10] Specifically, the Court considered whether UNSCR 1546 obliged (as opposed to permitted) the UK forces to intern for "imperative reasons of security" without intending to bring criminal charges.[11] The Court concluded "neither Resolution 1546 nor any other United Nations Security Council resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to be a risk to the security of Iraq in indefinite detention without charge."[12]

Applying this conclusion, the Court found no conflict between the UK's obligations under the UN Charter and UNSCR 1546 and its obligations under Article 5 ECHR. As such, subparagraphs (a) to (f) of Article 5(1) ECHR applied, and Al-Jedda's detention violated Article 5(1) ECHR.[13] As mentioned earlier, Al-Jedda's detention was post-occupation during the existence of a fully sovereign Iraqi regime to which UNSCR 1546 authorized a CMF "to contribute to the maintenance and security and stability in Iraq".[14] The Court could have reached the same result if it had found, on the facts of the case, that the Al-Jedda's detention was part of law enforcement and peacekeeping operations, not an armed conflict.

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[10] *Al-Jedda v. United Kingdom, supra* note 4, para 101.

[11] *Ibid*., paras. 107 and 109.

[12] I*bid*., para. 109. The UNSCRs did not include the phrase "indefinite internment" or "indefinite detention". The Court's conclusion leaves open the question: If the UNSCRs had used obligatory language, would the result have been the same?

[13] *Ibid*., para. 110.

[14] *Ibid*., para. 104.

In *Hassan v. United Kingdom*[15] the ECtHR was confronted with a case of detention for imperative reasons of security by UK forces during the IAC in Iraq and was compelled to examine the application of IHL and ECHR to Hassan's detention. The Court addressed whether combatants, those suspected of being combatants and/or civilians caught up in the IAC, could be detained under IHL and if they could, what the procedural safeguards were. The Court decided that IHL was the primary body of law to be applied in IAC and no breach of Article 5 ECHR was to be found, provided IHL norms are met.[16]

How the Facts in *Al-Jedda* and *Hassan* Influenced Their Outcomes

Al-Jedda and *Hassan* illustrate how facts influence outcomes. The most obvious influencer is length of detention. Al-Jedda was detained for 3 years, 2 months and 20 days while Hassan was detained for 9 days. Another influencer is the nature of the armed conflict and the applicable rules and procedural safeguards for detention. Other facts will include reasons for, place of and treatment during arrest and detention, conditions during processing, classification and interrogation, and decisions on detention, transfer for prosecution or release, etc. There are also ancillary factors such as background, citizenship, strength of case for detention, etc. Facts are essential to deciding if the detention was during an armed conflict classified as an IAC, a NIAC or a domestic situation. The nature of armed conflict and the applicable rules and procedural safeguards for detention will ultimately inform the legal framework for the final decision on whether the detention was lawful under IHL and ECHR.

Al-Jedda Detention Facts

When compared to *Hassan*, the discussion of detention facts in *Al-Jedda* lacks depth of detail. This suggests that the ECtHR was not persuaded that the facts warranted an in-depth analysis, because it was clear that his three-year plus detention was arbitrary and procedurally flawed. The essential facts in *Al-Jedda* make it clear that the UK would not succeed. Al-Jedda was a British national,

[15] *Hassan v. United Kingdom*, *supra*, note 1, para 104.

[16] *Ibid*., paras. 104-106. It must be mentioned that during the initial IAC period, no UNSCRs were extant.

having become a citizen in June 2000. On 28 September 2004, Al-Jedda was travelling with his wife and family to Iraq from London via Dubai, where he was arrested based on the British intelligence request. He was questioned by UAE intelligence officers for 12 hours then released. He continued his journey to Iraq. On 10 October 2004, US soldiers acting on British intelligence arrested Al-Jedda at his sister's house in Baghdad. He was transported by UK aircraft to Basrah and detained at the British-run Sha'aibah Divisional Detention Facility. The grounds for his detention for imperative reasons of security included recruiting terrorists, facilitating travel of an explosive expert, conspiring to conduct attacks on coalition forces, conspiring to smuggle high tech detonation equipment into Iraq for the use against coalition forces. No additional grounds were added, nor were criminal charges ever brought against him in Iraq or the UK.[17] On 14 December 2007, the United Kingdom revoked his citizenship based on the grounds of detention.[18] A stateless Al-Jedda was released from detention on 30 December 2007. In total, his detention lasted 3 years, 2 months and 20 days.

The ECtHR in *Al-Jedda* avoided considering if IHL was applicable to the armed conflict in Iraq during Al-Jedda's detention. Instead, it used a technical legal interpretation of the applicable UNSCRs based on a drafting ambiguity to negative the possible co-application of IHL and ECHR. This legal finding obviated the Court's need to examine the case facts in detail, including whether the armed conflict was a NIAC, and whether IHL applied to Al-Jedda's detention. It may well be that a full and critical review of the facts could have justified a finding that Al-Jedda's detention was in breach of both IHL and Article 5 ECHR.

Hassan **Detention Facts**

In *Hassan*,[19] the facts are not complicated, but are set out in much greater detail than in *Al-Jedda*. Tarek Hassan was a 22-year-old Iraqi

[17] One would think that the security reasons would have been supported by sufficient provable facts to justify a criminal investigation in the UK or Iraq, or both. Given the serious allegations, it is surprising that the decision to release him without charges was not taken sooner.

[18] Al-Jedda's citizenship revocation review was unsuccessful.

[19] *Hassan v. United Kingdom*, *supra*, note 1.

living in the Basrah region when the US and UK forces invaded Iraq on 20 March 2003. Under IHL, this operation was an IAC. The UK troops captured Basrah on 5 April 2003, and the US troops captured Baghdad on 9 April 2003. Major combat operations in Iraq ceased on 1 May 2003. During the conflict, UK troops arrested high-ranking Ba'ath party officials while Iraqi militias killed them. Tarek's brother, a general manager in the national secretariat of the Ba'ath party and a general in the Al-Quds Army, the army of the Ba'ath Party, went into hiding with his family. He asked Tarek Hassan and his cousin to stay at and protect the family house in Umm Qasr, a port city about 50 km from Basrah City. On 23 April 2003, UK soldiers went to the house to arrest Tarek's brother. Only Tarek Hassan was there. He was arrested. Firearms and documents related to local membership in the Ba'ath Party and Al-Quds army were seized. Tarek Hassan was taken to Camp Bucca, a UK Detention camp in southeastern Iraq. He was processed as a "default POW" pending initial screening. His first screening interview was on 23 April. At his second screening interview on 25 April, he was determined not to be a combatant or a security threat.[20] He was cleared for release and transferred to the civilian pen on 25 April at 20:00. He was released on 2 May at 00:01 as part of a bulk release of non-POW and security detainees following the cessation of hostilities. Hassan was detained for 9 days.

The Court in *Hassan* found that Hassan's detention occurred in an IAC. It found that detention under IHL norms is not incompatible with the grounds of detention in Article 5(1) ECHR. Moreover, the absence of the Article 15 ECHR derogation by the United Kingdom did not prevent the Court from concluding that: "even in situations of international armed conflict, the safeguards of the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law".[21] The Court however emphasized that this finding was limited to IAC, where the taking of prisoners and interning civilians

[20] The UK government had decided to release all detainees prior to or immediately following the cessation of hostilities announced on 1 May 2003, save and except those suspected of criminal offences or of activities posing a security risk. *Hassan v. United Kingdom*, *supra*, note 1, para 55.

[21] *Ibid*., para. 104.

were accepted features of IHL. Article 5 of the ECHR could be viewed as "permitting the exercise of such broad powers".[22]

In summary, *Hassan* confirms that IHL is the primary body of law applied in IAC and no breach of ECHR will be found provided IHL rules are complied with and the detention under IHL rules was "in keeping with the fundamental purpose of Article 5(1), which is to protect the individual from arbitrariness."[23] As to procedural safeguards applicable during IAC, Article 5(2) and Article 5(4) ECHR "must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law".[24]

Can ECHR accommodate IHL in NIACs?

Post-*Hassan*, one important issue remains to be decided by the ECtHR: How do IHL and the ECHR apply in security detention cases arising in NIACs? This issue was front and center in the recent United Kingdom Supreme Court (UKSC) Judgment in *Abd Ali Hameed Ali Al-Waheed and Serdar Mohammed*.[25] The two cases were among several hundred actions alleging unlawful detention and maltreatment by UK forces. They were "heard together with a view to resolving one of the more controversial questions raised by such actions, namely the extent to which article 5 applies to military detention in the territory of a non-Convention state in the course of operations in support of its government pursuant to the mandates of the United Nations Security Council."[26] Al-Waheed's case involved the armed conflict in Iraq, and Serdar Mohammed's case involved the armed conflict in Afghanistan. For procedural reasons associated with Al-Waheed's "leap-frog appeal", a limited number of facts were agreed for his appeal, but there were no findings. Due to this, the UKSC Judgment only briefly discussed the detention facts for Al-

[22] *Ibid*., para. 104.
[23] *Ibid*., paras. 105-6.
[24] *Ibid*., para. 106.
[25] *Abd Ali Hameed Ali Al-Waheed (Appellant) v. Ministry of Defence (Respondent) and Serdar Mohammed (Respondent) v. Ministry of Defence (Appellant)*, [2017] UKSC 2, (hereinafter referred to in the text as "*Serdar Mohammed*", and in the footnotes as "*Serdar Mohammed v. Ministry of Defence*").
[26] *Ibid*., para. 2.

Waheed.[27] For discussion purposes, the facts about Al-Waheed's arrest and detention have been augmented with facts from the Judgment of his subsequent trial before the England and Wales High Court of Justice, Queen's Bench Division (EWHC).[28] Both cases again illustrate how facts influence outcomes.

Al-Waheed Detention Facts

At the time of Al-Waheed's detention, the relevant UNSCR was 1723 (2006). This extended the authority conferred by UNSCR 1546 (2004), which had marked the point at which Britain ceased to be an occupying power in Iraq and became a mandatory power acting in support of the newly formed indigenous government of Iraq.[29] UNSCR 1546 "gave authority to take all necessary measures, which, it was expressly stated, would include 'internment where it is necessary for imperative reasons of security'".[30]

On 11 February 2007, UK forces raided the family home of Al-Waheed's wife in Basrah, Iraq. Al-Waheed had recently remarried and was visiting his wife who was convalescing after surgery at her family home so that her sister could take care of her. The forces were looking for Al-Waheed's brother-in-law, Ali Jaheel, who also lived in the home. He was suspected of involvement in terrorist activities. Ali Jaheed was out, but improvised explosive devices (IEDs) and explosive charges, and other weaponry were found on the premises.[31] Al-Waheed was arrested and taken to Basra Airport base for initial processing. During questioning he stated that he was visiting his wife at the time

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[27] *Ibid*., para. 3.

[28] See *Kamil Najim Abdullah Alseran, Abd Ali Hameed Ali Al-Waheed, MRE and KRU (Claimants) v. Ministry of Defence (Defendant)* [2017] EWHC 3289 (QB), (hereinafter referred to in the text as "*Al-Waheed*", and in the footnotes as "*Al-Waheed v. Ministry of Defence*"). This judgement contains a very detailed description of the facts for *Al-Waheed*. See paragraphs 538 to 720.

[29] *Serdar Mohammed v. Ministry of Defence*, *supra* note 25, para. 19, 152. See paras. 5-6 noting that UNSCR 1546 was considered in *Al-Jedda* v. *United Kingdom, supra* note 4.

[30] *Ibid*., para. 153.

[31] *Al-Waheed v. Ministry of Defence, supra* note 28, paras. 541-543.

of his arrest and knew nothing of any evidence recovered from the house.[32] On 12 February a decision was taken to intern Al-Waheed. The decision was taken on the basis that Al-Waheed "was found in a room handling an IED".[33] He was then transferred to the Divisional Temporary Detention Facility at Shaibah. Initially, he was held in the North Compound for interrogation by the Joint Forward Interrogation Team (JFIT).[34]

On 13 February, an *ad hoc* British Divisional Internment Review Committee (DIRC) decided that he should be interned for imperative reasons of security. The reasons were that "he had been messing around with an IED. He fled the room before being restrained by British troops".[35] These reasons were baseless. At the next regular meeting of the DIRC on 22 February, the inaccurate information about Al-Waheed's arrest had been corrected. Al-Waheed was not in the same room as the IED, he was just found in the same house. The JFIT who had interrogated Al-Waheed over the last ten days opined that he was merely "in the wrong place at the wrong time". The committee decided by a majority of three to two to release him.[36] However, notwithstanding the DIRC's decision, Al-Waheed was not released until 28 March after the DIRC (on 27 March) decided to stand by its original decision to release him. In total, he was detained for 44 days. Leggatt, J. describes in detail the unsatisfactory reasoning for Al-Waheed's continued detention.[37]

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[32] *Ibid*., para. 558.

[33] *Ibid*., para. 559.

[34] *Ibid*., para. 565. Al-Waheed was found to have been beaten after his arrest (para. 654) and to have suffered further inhuman and degrading treatment encompassing harsh interrogation (para. 676), being deprived of sleep (para. 691) and of sight and hearing (para. 688).

[35] *Ibid*., para. 605.

[36] *Ibid*., para. 606.

[37] *Ibid*., paras. 607-616. Applying the UKSC *Serdar Mohammed* judgement, Leggatt, J. in *Al-Waheed* held that Al-Waheed was lawfully detained for imperative reasons of security from 12–22 February 2007. From 23 February to 28 March, he found that these reasons no longer existed, and that his detention lacked any lawful basis. For the latter period, it was contrary to article 5(1) ECHR. *Al-Waheed v. Ministry of Defence, supra* note 28, para. 702.

Serdar Mohammed Detention Facts

In the armed conflict in Afghanistan, the Afghan Interim Authority (AIA), assisted by the International Security Assistance Force (ISAF) coalition, fought against non-state actors, namely the Taliban and other extremist groups. ISAF was created by UNSCR 1386 (2001), with the mandate to assist in the maintenance of security for Kabul and its surrounding areas and to establish and train new Afghan security and armed forces. ISAF's mandate to support the AIA recognized that the AIA retained responsibility for security and law, and order. [38] On 14 January 2002, a Military Technical Agreement (MTA) was concluded between the ISAF and the IAA to define their respective obligations and responsibilities. The MTA gave ISAF the authority to do all that the ISAF Commander judges necessary and proper, including the use of military force, to protect ISAF and the Mission.[39] The ISAF mandate was subsequently extended to include the whole country through UNSCR 1510 (2003) and then by annual extensions on materially identical terms. Increased attacks against civilians and the Afghan and international forces in the early 2000s saw UNSCRs repeatedly affirm the application of IHL to the insurgency. [40]

UK forces captured Serdar Mohammed (SM), a suspected Taliban commander, in a military operation on 7 April 2010. He was allegedly "captured in the course of a planned operation involving a firefight lasting ten hours in which a number of men were killed or wounded, and that he was seen to flee from the site, discarding a rocket-propelled grenade launcher and ammunition as he went. … Intelligence is said to have identified him

[38] *Ibid*., paras. 21-22. See also *Serdar Mohammed v. Ministry of Defence*, [2014] EWHC 1369(QB), at paras. 26-27, (hereinafter referred to as in the text as "*Serdar Mohammed No.1*").

[39] *Ibid*., paras 28-29.

[40] *Ibid*., paras. 30-31. For example, see UNSCR 1510 (2003), UNSCR 1776 (2007) and UNSCR 1890 (2009). These resolutions authorized, *inter alia*, "the Member States participating in the ISAF to take all necessary measures to fulfill its mandate", determined "that the situation in Afghanistan still constitutes a threat to international peace and security" and renewed the authority for "all appropriate measures to be taken to ensure the protection of civilians". The phrase "take all necessary measures to fulfill its mandate" is the authority relied on by UK forces to justify the detention of individuals in Afghanistan. *Ibid*., para. 27.

shortly afterwards as a senior Taliban commander who had been involved in the large-scale production of IEDs and was believed to have commanded a Taliban training camp in 2009."[41] He was initially detained as a security risk for 96 hours under the ISAF detention policy.[42] He was then held a further 25 days for military intelligence interrogation. On 4 May, the UK authorities concluded that no more intelligence could be obtained from SM and on 6 May, asked the Afghan authorities if they wished to take SM into custody for investigation and possible prosecution. The Afghan authorities replied positively, but advised that they had insufficient capacity at the prison to which he was to be transferred. As a result, SM remained in UK detention for a further 81 days.[43] On 25 July 2010, SM was transferred to the Afghan authorities, following which he was tried before the Afghan court for insurgency offences, found guilty and sentenced to 10 years' imprisonment.[44]

For the duration of SM's 110-day detention, the UK authorities followed ISAF Standard Operating Procedure (SOP) SOP 362 and UK Standard Operating Instructions (SOI) SOI J3-9, which set out the standards for the treatment of detainees, POWs, and civilians held for security reasons in Afghanistan. The SOPs and SOIs covered armed conflict detention situations generally and contained the minimum procedural standards required by the Geneva Conventions.[45] The UKSC found however that SOI J3-9 (Amendment 2), the operative SOI, lacked certain "minimal procedural safeguards", a defect which was held to be "unwise as well as legally indefensible".[46]

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[41] *Serdar Mohammed v. Ministry of Defence*, *supra* note 25, para. 4.

[42] *Ibid*., para. 32. ISAF detention policy was based on ISAF force protection, self-defense for ISAF forces or its personnel, and accomplishment of ISAF mission. The agreed time limit for detention before release or transfer to Afghan authorities was 96 hours. Detentions could exceed the 96-hour limit under national policy considerations or logistical issues about effecting release or transfer within 96 hours.

[43] *Ibid*., paras. 34-39, 71-75.

[44] *Ibid.,* para. 4.

[45] *Ibid*., paras. 34-39, 67-68, 167, 205-6, 356-357 for a discussion on ISAF SOP 362 and UK SOI J3-9 applicable to UK forces in Afghanistan. See also *Serdar Mohammed No.1*, *supra* note 39, paras. 4, 34-37. For discussion regarding SOI J3-9 applicable to UK forces in Afghanistan, see *Ibid*., paras. 38-49 and for discussion on Amendment 2 to SOI J3-9 issued on 12 April 2010, see *Ibid*., paras. 50-53.

[46] *Serdar Mohammed v. Ministry of Defence*, *supra* note 25, paras. 103-108, 359.

Al-Jedda, *Hassan, Al-Waheed* and *Serdar Mohammed* illustrate that the facts can influence whether and to what extent an accommodation of ECHR in favor of IHL will be possible. The facts in *Al-Waheed* and *Serdar Mohammed* are not as good as *Hassan* (full accommodation), and not as bad as *Al-Jedda* (no accommodation). The judgements in *Al-Waheed* and *Serdar Mohammed* (partial accommodation) establish that although detention for imperative reasons of security can be justified in a NIAC, deficient legal reasons for continued detention[47] and/or inadequate procedural safeguards can result in an ECHR breach.[48] Detention facts matter.

Detention in Extraterritorial NIAC's — A Common Sense Accommodation under ECHR

Hassan was limited to IAC. *Hassan* did not address NIACs. Arguably, *Hassan* left open whether security detention of combatants and civilians in an extraterritorial NIAC falls under IHL or ECHR norms. *Serdar Mohammed* examined a situation of a NIAC (where the Geneva Conventions do not specifically apply) to decide if the UNSCR authorizing certain security detention measures provided the requisite legal authority to detain. [49] The UKSC (by a 7 to 2 majority) held that, for the purposes of Article 5(1) ECHR, UK armed forces had the legal power to detain pursuant to UNSCR 1546, where the detention was necessary for imperative reasons of security. The Court majority found:

> "The Security Council Resolution has to be interpreted in the light of the realities of forming a multinational force and deploying it in a situation of armed conflict … Resolution 1386 (2001) provides for the creation of that force, but article 3 (quoted above) expressly confers authority to take 'all necessary measures' on the member states participating in it. … It follows that the United Kingdom was entitled to adopt its own detention policy, provided that that policy was consistent with the

[47] *Ibid*., note 37 for *Al-Waheed*.

[48] *Ibid*., note 62 for *Al-Waheed* and *SM*. *Ibid*., para. 111(5) for SM holding that the "arrangements for SM's detention were not compatible with ECHR article 5(4) in that he did not have any effective means of challenging the lawfulness of his detention."

[49] There is an interesting ongoing academic debate on this issue, but it is outside the scope of this paper.

> authority conferred by the relevant Security Council Resolutions, i.e. provided that it did not purport to authorise detention in circumstances where it was not necessary for imperative reasons of security." [50]

The UKSC justified an accommodation in favor of IHL on the *Hassan* distinction between peacetime and armed conflict scenarios. It held that

> "The fundamental question in Hassan was whether the six permitted grounds listed in article 5(1) of the Convention were to be treated as exhaustive in the context of armed conflict. The Court decided that they were not. This was because the exhaustive list of permitted grounds (in the ECHR) was designed for peacetime and could not accommodate military detention in the very different circumstances of an armed conflict: para. 97. … At para. 104, it drew the same distinction as the International Court of Justice had made between peacetime norms, such as the prohibition of internment by international human rights instruments, and detention in the course of an armed conflict. These points do not depend on the international armed conflict in question. The taking of prisoners of war and the detention of civilians posing a threat to security are inherent in international and non-international armed conflicts *alike*. The practice of states to detain is common to both and is universal in both contexts."[51]

The UKSC noted that "some aspects of the functions of peacekeeping forces deployed in Iraq and Afghanistan can more readily be accommodated within the six specified grounds in Article 5(1) than the internment of prisoners of war in an international armed conflict" and that "their mandate under the relevant Security Council Resolutions extended well beyond operating as an auxiliary police force. It required them to engage as combatants in an armed conflict with the forces of a violent, organized insurrection, with a view to defending itself, protecting the civilian population, and creating a secure environment for the reconstruction of the country."[52]

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[50] *Serdar Mohammed v. Ministry of Defence*, *supra* note 25, *para. 38*. For a fuller discussion on this issue, see *Internment in Armed Conflict: Basic Rules and Challenges*, ICRC Opinion Paper, November 2014, pp. 6-9.

[51] *Ibid.*, para. 61 (see also, paras. 134-136, 164 and 234).

[52] *Ibid.*, para 62. The facts of the individual case will inform if the alleged breach falls under the peacekeeping or combatant mandate or in other words, if the ECHR or IHL

Having concluded that the six specified grounds in Article 5(1) ECHR were not necessarily exhaustive in a situation of armed conflict, the Court posited the "question as to whether there is some alternative legal standard to determine what circumstances justify detention and subject to what procedural safeguards".[53] The Court noted that the ECtHR in *Hassan* answered the question by seeking to identify the "fundamental purpose" of Article 5(1) ECHR and to consider whether that purpose would be sufficiently served by the rules applicable in armed conflict, even if the case did not come within the six specified grounds. They considered that, as with other international human rights instruments, the fundamental purpose of Article 5 was to "protect the individual from arbitrariness" (para. 105). The essence of arbitrariness is discretion uncontrolled by law. There are two essential conditions for ensuring that detention was not uncontrolled by law. The first was that there should be a legal basis for it. In other words, there must be a legal power to detain, and it must not be exercisable on discretionary principles as broad, flexible or obscure as to be beyond legal control. The second was that there must be some sufficient means available to the detainee to challenge the lawfulness of his detention.[54]

In deciding these two questions in a NIAC, the UKSC referred first to its earlier reasons that the UNSCRs provided a sufficient legal basis for detention commenting that the "implicit limitation to occasions where detention is necessary for imperative reasons of security, provides a clear legal standard which is no wider the purpose of the UN mandate requires".[55] As to the second question, referring to Articles 42 and 78 of the Fourth Geneva Convention, the Court noted that it is the same standard that the ECtHR in *Hassan* endorsed in the context of an IAC.[56] It also noted that these articles represent "a model minimum standard of review required to prevent the detention from being treated as arbitrary … not just for cases to which those articles directly apply, but generally".[57]

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have primacy where UNSCR's are the legal basis for detention.

[53] *Ibid.*, para 63.

[54] *Ibid.*, para 63.

[55] *Ibid.*, para 65.

[56] *Ibid.*, para 65.

[57] *Ibid.*, para 66.

Finally, the UKSC addressed the fact that the UNSCRs contain no procedural safeguards. The Court found under such circumstances it was

> "…incumbent on Convention states, if they are to comply with Article 5, to specify the conditions on which their armed forces may detain people in the course of an armed conflict and to make adequate means available to detainees to challenge the lawfulness of their detention under their own law. There is no reason why a Convention state should not comply with its Convention obligations by adopting a standard at least equivalent to articles 43 and 78 of the Fourth Geneva Convention, as those participating in armed conflicts under the auspices of the United Nations commonly do. Provided that the standard thus adopted is prescribed by law and not simply a matter of discretion, I cannot think that it matters to which category the armed conflict in question belongs as a matter of international humanitarian law. The essential purpose of article 5, as the court observed at para. 105 of *Hassan*, is to protect the individual from arbitrariness. This may be achieved even in a state of armed conflict if there are regular reviews providing 'sufficient guarantees of impartiality and fair procedure to protect against arbitrariness' (para 106)."[58]

The UKSC held that the UK's forces in Afghanistan did have the authority to take and detain civilians taking part in hostilities for periods longer than 96 hours for reasons of security. Following the rationale of *Hassan*, the UKSC reconciled the power to detain under IHL with the six permitted grounds of detention under Article 5 ECHR by concluding that the six permitted grounds for detention were designed *for peacetime conditions* and could not be regarded as exhaustive in conditions of armed conflict.[59] As to the procedural provisions of Article 5(4) ECHR, the UKSC held that they "may fall to be adapted where this is necessary in the special circumstances of armed conflict, provided that minimum standards of protection exist to ensure that detention is not imposed arbitrarily".[60]

The Court went on to find that as a consequence of Article 5 ECHR being read to accommodate detention for security reasons, an initial

[58] *Ibid.*, para. 67.
[59] *Ibid.*, paras. 68(2).
[60] *Ibid.*, para. 68(3).

review of the appropriateness of detention was required, followed by regular reviews thereafter, and that the reviews should be conducted by an impartial body in accordance with a fair procedure. These procedures are consistent with those flowing from security detentions in IACs under the Geneva Conventions.[61]

The UKSC concluded that the Article 5(4) ECHR protection from arbitrariness is equivalent to the conditions imposed upon detaining powers in Articles 43 and 78 of the Fourth Geneva Convention, including that the detaining power must create an impartial body capable of conducting regular reviews of detention with a fair procedure, allowing the detainee a reasonable opportunity to exercise the right to challenge the grounds for detention. The Court reviewed in detail the internal review procedures of the ISAF and MOD and used the SOPs and SOIs to test the legality of SM's detention. The Court found that although the initial detention and review had been appropriate and lawful, after a period, SM's detention became unlawful, because the military detention review committee set up by the UK under SOI J3-9 (Amendment 2) to conduct such reviews did not meet the Article 5(4) ECHR requirements of fairness and impartiality.[62]

Conclusion

The UKSC's common sense approach of the Article 5 ECHR accommodation in favor of IHL-based security detention for extraterritorial NIACs under UNSCRs and UN Charter Chapter VII authority clarifies the ambiguity left by *Hassan*. IHL-based security detention applies to armed conflicts classified as IACs and extraterritorial NIACs.[63] More generally,

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[61] *Ibid*., paras. 68(3), 104.

[62] *Serdar Mohammed v. Ministry of Defence*, *supra* note 25, paras. 105-109. In *Al-Waheed*, Leggatt, J. found the "review procedure operated in Iraq at the time of Al-Waheed's internment did not meet any of the minimum conditions for a fair process." *Al-Waheed v. Ministry of Defence, supra* note 28, para. 708. The procedural deficiencies noted were "lack of independence of the review committee" and "no meaningful opportunity (for Al-Waheed) to participate in the reviews of his internment and to make representations." *Ibid*., para. 711.

[63] For UNSCR sanctioned extraterritorial peacekeeping operations, including law enforcement and security operations, ECHR will apply to all Convention-state peacekeepers.

IHL and ECHR co-apply in IAC and NIAC, but IHL norms have primacy. This accommodation does not undermine ECHR protections, since the basic corollary to accommodating IHL primacy is that IHL norms and procedures must match the fundamental purpose of the ECHR provision and applicable procedural protections to avoid an ECHR breach. The Court's approach also promotes the effective and practical protection of human rights in armed conflict.[64]

The question remains as to whether the UKSC's common sense approach in *Serdar Mohammed* will be accepted by the ECtHR? The legal authority to detain for imperative reasons of security under IHL for NIACs is not settled. However, by accepting UNSC resolutions as the legal basis for security detention in extraterritorial NIACs, the ECtHR can clearly delimit the three situations where security detention in IAC and NIAC may be accommodated under Article 5 ECHR namely: 1) security detentions during an IAC where IHL is applied; 2) security detentions during an extraterritorial NIAC authorized under UNSC resolutions where IHL is applied; and 3) security detentions during a NIAC where IHL and state law are applied.[65] Once the legal basis for the security detention is determined, the ECtHR can then examine the facts to determine whether security detention by a Convention-state was lawful and whether the procedural protections were adequate to protect the detainees from arbitrariness. If the factual basis is inadequate or the procedural protections are not fair or impartial, then ECHR provisions will apply.[66]

Many cases involving the conflicts in Iraq and Afghanistan do not make clear if the armed conflict was a NIAC, where IHL applied, or domestic law enforcement, where IHRL applied. While the

[64] *See* Simon Rose, Security Detention in non-international armed conflicts — The view of the European Court of Human Rights, at p.54.

[65] In situation 3, the state law may be guided by IHL and ECHR in establishing the minimum standards, conditions and procedures for security detention during a NIAC. It is an open question if a state law based on IHL provisions, which conflict with Art. 5 ECHR, will it require the Art 15 ECHR derogation to avoid a breach.

[66] See *Serdar Mohammed v. Ministry of Defence*, *supra* note 25 and *Al-Waheed v. Ministry of Defence, supra* note 28.

international armed forces were authorized by the UNSCRs to "take all necessary measures to contribute to the maintenance and security" of the host country, once there was a representative government in place, the line between NIAC and domestic law enforcement activities is often unclear. This uncertainty can be addressed by establishing IHL compliant military rules and procedures for NIAC and harmonizing them with IHRL. This harmonization is possible both in practice and in implementation. Harmonization can serve two positive functions: to minimize the risks of violating IHL and IHRL, and to afford greater human rights protections.

Dieter Fleck

The Impact of Armed Conflicts on the Jurisprudence of the European Court of Human Rights

I. Introduction

The European Court of Human Rights (ECtHR) was set up in Strasbourg 1959 by the Council of Europe Member States. The jurisdiction of the Court is to decide complaints (applications) submitted by individuals and States concerning violations of the European Convention on Human Rights (ECHR)[1] allegedly committed by a State party to the Convention that directly and significantly affected the applicant. Since August 2018, the Court also has advisory jurisdiction: under Protocol 16 to the European Convention[2] the highest domestic court in a State that is party to the Protocol may request the European Court to give an advisory opinion on a question of interpretation of the European Convention and its protocols that arises out of a case pending before the domestic court.

The relationship between international humanitarian law and human rights law has been shaped as part of a development that started at the Human Rights Conference in Teheran 1968[3] and did not end with the adoption of major human rights principles in Article 75 AP I.[4]

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[1] European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), 213 *UNTS* 221. As of November 2018, there are 47 State Parties to the Convention; these include the Member States of the Council of Europe and of the European Union. Some of these States have also ratified one or more of the Additional Protocols to the Convention, which protect additional rights.

[2] Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms (2 October 2013), *Council of Europe Treaty Series,* No. 214.

[3] Res. XXIII Human Rights in Armed Conflict, in Schindler/Toman (eds.), *The Laws of Armed Conflict*, 4th edn 2004, 347.

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts — AP I –, adopted on 8 June 1977, 1125 *UNTS* 3; *see* Michael Bothe, "The Historical Evolution of International Humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law", in Horst Fischer *et al.* (eds.), *Krisensicherung und Humanitärer Schutz. Crisis Management and Humanitarian Protection* (Berlin, 2004), 37-45, at 41.

For a full understanding of the jurisdiction of the Court in cases related to armed conflicts the wartime application and implementation of the relevant rights under the ECHR and its Protocols will be essential. I am particularly intrigued by the following questions raised by our hosts:

If IHL is applied in relation to the Convention as a *lex specialis*, what impact does the Convention have upon IHL rules in this regard? How does the application of the ECHR and IHL as a *lex specialis* differ from the application of IHL *per se*?

Yet I think that both sentences may — and should perhaps — be turned around:

If IHL is applied in relation to the Convention as *lex specialis*, what impact does it have on Convention rules in this regard? How does the application of the ECHR and IHL as *lex specialis* differ from the application of the Convention *per se*?

It is true that these questions are affected by an ongoing discussion on the general relationship between human rights and international humanitarian law.[5] The issue also needs to be discussed in light of the relevant practice

[5] The ICJ has convincingly characterized the relationship between human rights law and international humanitarian law as one of *lex specialis*, noting that in armed conflicts some rights are exclusively governed by international humanitarian law, while others are exclusively governed by human rights, and still others are governed by both bodies of international law in *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion (GA Request) of 9 July 1996, ICJ Reports 1996, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004, ICJ Reports 2004, paras. 102-142 [at 106]. While omitting the words '*lex specialis*' in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment of 19 December 2005, paras. 216-221, the ICJ emphasized (at para. 216) that "both branches of international law, namely, international human rights law and international humanitarian law, would have to be taken into consideration". Indeed, it should not be overlooked that many human rights apply simply in addition to international humanitarian law. The *complementarity* of human rights in armed conflict is certainly as relevant for military operations as the *lex specialis* character of international humanitarian law: Many subject-areas are dealt with more fully in human rights law than in international humanitarian law, *see e.g.*, the prohibition of slavery (Art. 8 ICCPR, Art. 4 ECHR); the freedom of opinion (Art. 18 ICCPR, Art. 9 ECHR, Art. 27 Arab Charter); the right to recognition as a person

of the ECtHR in recent years establishing the extraterritorial application of human rights in military operations.[6] But, more specifically, substantial legal limitations of individual human rights in times of armed conflict are to be considered here. How does the *lex specialis* principle work in practice? As of today, there is not much jurisprudence available in Strasbourg on this particular issue. Hence a comparison with the jurisdiction of other human rights bodies may be helpful, in particular

- the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights[7] which have dealt with some of these issues in quite prominent cases to be discussed below;
- the African Commission on Human and Peoples' Rights[8] and the African Court of Justice and Human Rights[9] which were given

before law (Art. 16 ICCPR, Art. 3 ACHR); the right to be free from imprisonment for failure to fulfil a contractual obligation (non-derogable under Art. ICCPR, derogable under Art. 1 of Protocol 4 to the ECHR, Art. 7 ACHR, Art. 14 Arab Charter); the right to a nationality (Art. 20 ACHR); the right to participate in government (Art. 23 ACHR); the right to existence and self-determination (Art. 20 African Charter). The Human Rights Committee has emphasized in its General Comment No. 36 (30 October 2018), para. 64, that "both spheres of law are complementary, not mutually exclusive".

[6] *See, in particular*, ECtHR, *Banković v. Belgium, the Czech Republic, Demark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, Decision as to the Admissibility of, Grand Chamber, Application No. 52207 of 12 December 2001, *available at*: https://hudoc.echr.coe.int/eng#{"itemid":["001-22099"]}, para. 71, were the Court recognized the exercise of extra-territorial jurisdiction when a State "through effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government".

[7] Inter-American Court on Human Rights, established in San José, Costa Rica, 1979 under Arts. 61-64 of the American Convention on Human Rights (ACHR) "Pact of San José, Costa Rica" (22 November 1969), 1144, I-17955 *UNTS* 144.

[8] African Commission on Human and Peoples' Rights, *available at*: https://www.achpr.org.

[9] The African Court of Justice and Human Rights was established in 2006 in Addis Ababa by a merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union and moved to Arusha (Tanzania) in 2007. The Court complements and reinforces the functions of the African Commission on Human and Peoples' Rights under Art. 30 and 45 of the African Charter on Human Rights and

particularly broad mandates to provide amicable settlement of human rights disputes and to resolve contentious cases[10] which still needs to be explored;

- the Arab Human Rights Committee established in 2009 under Article 45 of the Arab Charter[11] which does not, however, have the authority to receive individual complaints regarding human rights violations committed by Member States, and — as a universal institution
- the Human Rights Committee established under Article 28 of the ICCPR.[12]

Only a rather rudimentary overview could be prepared here, and critical comments and proposals will be more than welcome. My questions focus on

- jurisprudence related to armed conflicts (see below Section II): do the cases decided so far offer a full picture of current events? I am also interested in

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Peoples Rights "Banjul Charter" (1 June 1981), 1520 *UNTS* 217. *See* U. O. Umozurike, "The African Charter on Human and Peoples' Rights", 77, No. 4 *American Journal of International Law* (Oct., 1983), 902-912; Umozurike, "The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness", Vol. 13: Issue 1, Article 8 Annual Survey of International & Comparative Law (2007), *available at*: https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1116&context=annlsurvey; Richard Gittleman, "The African Charter on Human and Peoples' Rights: A Legal Analysis", 22:4 *Virginia Journal of International Law* (1982), 667-714.

[10] The Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (10 June 1998) which came into force on 25 January 2004, was replaced by the Protocol on the Statute of the African Court of Justice and Human Rights on 1 July 2008. Under Art. 28 of the Statute the Court "shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to: … d) any question of international law".

[11] Arab Charter on Human Rights (22 May 2004), reprinted in 12 *International Human Rights Reports* (2005), 893; *see* Mervat Rishmawi, "Arab Charter on Human Rights (2004)", in *MPEPIL;* Mohamed Y. Mattar, "Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards", in 26 *Harvard Human Rights Journal* (2013), 91-147, *available at*: https://harvardhrj.com/wp-content/uploads/sites/14/2013/05/V26-Mattar.pdf.

[12] International Covenant on Civil and Political Rights (19 December 1966), 999 *UNTS* 171.

- a comprehensive comparison of the jurisprudence of the different human rights bodies (Section III): to what extent have they helped to clarify the complex relationship between human rights law and international humanitarian law as two distinct, but interrelated legal branches? As indicated by our chair, there are quite different approaches the various human rights bodies are taking to establishment of facts and assessment of evidence. Such differences will have to be taken into consideration. Yet I will focus on the impact international humanitarian law has on the application of human rights. More specifically, I will discuss
- the standards for legal proceedings (Section IV): are they comparable, and are they sufficient to meet contemporary challenges? Finally,
- some conclusions may be drawn (Section V).

II. Cases Related to Armed Conflicts

For human rights law a wide application in situations of crisis and even in wartime is undoubtedly part of the progressive development of international law today.[13] The fact that certain human rights may be derogated in times of emergency[14] is of minor practical importance in this context: those human rights which have been formally adopted by international humanitarian law (see Article 75 AP I, a provision that may have now even reached customary law status, as emphasized in Rules 87-105 of the ICRC Study on Customary International Humanitarian Law — CIHL –[15]) have thus become non-derogable.[16] Article 15, para. 1, ECHR explicitly limits a State considering derogations by establishing the condition "that such measures

[13] *See* International Law Commission (ILC), Draft Articles on the Effect of Armed Conflict on Treaties with Commentaries, adopted in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10), *Yearbook of the International Law Commission, 2011*, vol. II, Part Two.

[14] *See* Art. 4 ICCPR, Art. 15 ECHR, Art. 27 ACHR, Art. 4 (1) Arab Charter. There is no derogation clause in the African Charter.

[15] J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law*, Cambridge: Cambridge University Press, 2005.

[16] ICRC Commentary to Art. 75, AP I, para. 3006, *available at*: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=E46340B132AC1B86C12563CD004367BF; Bothe (above, n 3), at 41-42.

are not inconsistent with its other obligations under international law". State practice has also shown that derogations have hardly been declared in times of armed conflict.[17]

For international humanitarian law, however, the range of applicability is more limited, as relevant protections are confined to situations of armed conflict or occupation. It may be a matter of dispute, and has, indeed, been disputed at least at the beginning of many armed conflicts like the present one in Syria, whether there is such a situation. Warring parties, in particular the government in a non-international armed conflict, may be interested to classify the conflict as an internal disturbance. International appeals to apply IHL hardly have binding force, unless the Security Council will take measures under Chapter VII of the UN Charter. Furthermore, there is no treaty definition of the term "armed conflict",[18] and in many situations a clear classification will be difficult. This is particularly relevant, as Article 3 common to the Geneva Conventions obliges the parties of internal armed conflicts to humane treatment of those persons who do not take part or who no longer take active part in the hostilities. Standards for humane treatment may be difficult to define during ongoing hostilities.

Few practical examples for international humanitarian law as *lex specialis* have been considered in the jurisprudence of human rights bodies:

The Inter-American Commission on Human Rights has decided in *Avilán,*[19] a case in which extrajudicial executions during the non-international armed conflict in Colombia had to be investigated, that the non-derogable guarantee of the right to life set forth in the ACHR applies

[17] Thomas Buergenthal, "To Respect and to Ensure: State Obligations and Permissable Derogations", in Louis Henkin (ed.), *The International Bill of Human Rights* (1981), 72; Rosalyn Higgins, "Derogations under the Human Rights Treaties" (1976-77), in 48 *BYBIL,* 281; Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, 2006), 118.

[18] See discussion in ILA Committee on the Use of Force, Final Report on the Meaning of Armed Conflict in International Law (74th Conference, The Hague, 2010), 676-721; *see also* Draft Articles on Effects of Armed Conflicts on Treaties, *available at*: https://untreaty.un.org/ilc/texts/ instruments/english/commentaries/1_10_2011.pdf, Art. 2(b).

[19] Inter-American Commission on Human Rights, Colombia, Report No. 26/97, Case 11.142 (30 September 1997).

along with and is informed by the provisions of international humanitarian law for internal hostilities. In *Coard*,[20] the Commission confirmed that both systems of international law — humanitarian law and human rights — were applicable in the armed conflict between Grenadian nationals and United States military forces in 1983. The Commission held that the concurrent application of the two systems of protection is inevitable, and that it is competent therefore to investigate the procedures taken by the parties involved in the conflict. In *Tablada*,[21] where State agents allegedly had used illegal methods and means of combat, the Commission concluded that the killing or wounding of the attackers during non-international armed conflicts and internal disturbances prior to the cessation of combat in January 1989 were legitimately combat related and, thus, did not constitute violations of the ACHR. The Commission also stated that it was in clear violation of Article 5 ACHR that all survivors of the attack and seven persons convicted as accomplices were tortured *hors de combat* and executed extrajudicially.

The Inter-American Court on Human Rights has specified in *Las Palmeras*[22] that although the Inter-American Commission has broad faculties as an organ for the promotion and protection of human rights, it can clearly be inferred from the ACHR that the procedure initiated in contentious cases before the Commission, which culminates in an application before the Court, should refer to rights protected by the ACHR and that the Commission and the Court did not have the competence to determine whether a given act was in violation of the Geneva Conventions or treaties other than the ACHR. Yet as the Court had confirmed in *Bámaca-*

[20] Inter-American Commission on Human Rights, Report No. 109/99, *Coard et al. v. United States* (29 September 1997), Case 10.951, *available at*: https://www.refworld.org/cases,IACHR,502a39642.html, paras. 39, 42.

[21] Inter-American Commission on Human Rights, Report No. 55/97, *Juan Carlos Abella* (18 November 1997), Case 11.137, *available at*: http://hrlibrary.umn.edu/cases/1997/argentina55-97a.html, paras. 188, 379, 381, and 387; see L. Zegveld, "The Interamerican Commission on Human Rights and international humanitarian law: A comment on the Tablada case", in 80 No. 324 *IRRC* (September 1998), 505.

[22] Inter-American Court on Human Rights, *Las Palmeras v. Colombia*, Series C No. 67, Judgment of 6 December 2001, *available at*: http://www.corteidh.or.cr/docs/casos/articulos/seriec_90_ing.pdf, para. 34; *see* Zegveld, "Remedies for victims of violations of international humanitarian law", 85 No. 851 *IRRC* (2003), 497-527, at 516.

Velásquez,[23] this does not preclude taking into consideration provisions of international humanitarian law in order to interpret the ACHR. In this context it should also be considered that human rights bodies have a responsibility to investigate those limitations of human rights in armed conflicts which may apply under the *lex specialis* role of international humanitarian law. It is for this reason that international humanitarian law must be dealt with also by human rights organs which may thus provide support to ensure respect for international humanitarian law.

The ECtHR has shown a certain reluctance to address specific requirements for the application of human rights in armed conflicts. In *Behrami and Saramati* the Grand Chamber declared that the ECHR could not be interpreted in such a way as to place under its control the actions of States covered by SC Resolutions and committed prior to or during UN missions aimed at preserving international peace and security.[24] A similar decision on non-admissibility was made in *Mothers of Sebrenica*.[25] In Chechnya cases the Court applied human rights without investigating specific consequences that might derive from the existence of an armed conflict.[26] While this might have been influenced by pleadings of the parties, I would submit that the question whether human rights law proper or human rights law informed by the law of

[23] IACtHR, *Bámaca v. Velásquez v. Guatemala,* Judgment of 25 November 2000, Series V No. 70 (4 September 2006), *available at*: http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf, paras 205-209.

[24] ECtHR, *Behrami and Behrami v. France*, Application No 71412/01, and *Saramati v. France, Germany and Norway,* Application no. 78166/01, decision of 2 May 2007, *available at*: https://hudoc.echr.coe.int/eng#{"itemid":["001-80830"]}, paras. 144-152. For a critical review see M. Milanović and T. Papić, "As Bad as It Gets: The European Court of Human Rights, *Behrami and Saramati* Decision and General International Law", 58 *ICLQ* (2009), 267-296.

[25] ECtHR, *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Application no. 65542/12, decision of 11 June 2013, *available at*: https://hudoc.echr.coe.int/eng#{"itemid":["001-122255"]}.

[26] See, e.g., *Medka Isayeva, Yusopova and Bazayeva v. Russia,* Application Nos. 57947/00, 57948/00 and57949/00, Judgment of 24 February 2005, *available at*: https://casebook.icrc.org/case-study/echr-isayeva-v-russia; *Goncharuk v. Russia*, Application No. 58643/00, Judgment of 4 October 2007, *available at*: https://www.legal-tools.org/doc/2c1d75/pdf/; *Tangiyeva v. Russia*, Application No. 57935/00, Judgment of 29 November 2007, *available at*: http://www.conventions.ru/view_base.php?id=8988.

armed conflict applies is a matter that should be examined by the Court *ex officio*. It may be noted that the Russian Constitutional Court had no difficulty years before, to state that the Chechnya Conflict had even reached the specific threshold of a non-international armed conflict under Article 1 AP II.[27] A recent fact sheet of the ECtHR[28] mentions the Chechnya cases as those happening in armed conflict situations, but no specific finding on this issue was included in the decisions as such. Similarly, in Northern Ireland cases[29] as well as in cases connected with military operations against the Kurdish Working Party (PKK)[30] there were no considerations on the existence of an armed conflict. While the ECtHR had rightly confirmed on many occasions, e.g., in *Loizidou,*[31] *Al-Adsani*[32] and *Hassan,*[33] that the ECHR cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part; more specific issues on the relationship between human rights and international humanitarian law have been addressed only occasionally, as in

[27] Constitutional Court of the Russian Federation, Judgment of 31 July 1995, English translation provided by the European Commission for Democracy through Law of the Council of Europe, CDL-INF (96)1; *see* P. Gaeta, "The Armed Conflict in Chechnya before the Russian Constitutional Court", 7 (no. 4) *EJIL* (1996), 563-570, at 569; Bakhtiyar Tuzmukhamedov, "The implementation of international humanitarian law in the Russian Federation", 85 (no.850) *IRRC* (June 2003), 385-396, at 395.

[28] ECtHR, Fact Sheet — armed conflicts (August 2019), *available at*: https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf.

[29] ECtHR, *X v. Ireland*, Application No. 6040/73, Judgment of 20 July1973; *McCann and Others v. United Kingdom*, Application No. 18984/91, Judgment of 27 September 1995, *available at*: https://hudoc.echr.coe.int/eng#{"itemid":["001-57943"]}.

[30] See, e.g., *Ergi v. Turkey,* Application No. 23818/94, Judgment of 28 July 1998, *available at*: https://hudoc.echr.coe.int/eng#{"itemid":["001-58200"]}, paras. 81-85.

[31] ECtHR *Loizidou v. Turkey* (merits), Application No. 15318/89, Judgment of 18 December 1996, *available at*: https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Loizidou%20v%20Turkey.pdf, para. 43.

[32] ECtHR, *Al-Adsani v. the United Kingdom* [GC], Application No. 35763/97, Judgment of 21 November 2001, *available at*: https://hudoc.echr.coe.int/eng#{"itemid":["001-59885"]}, para. 55.

[33] ECtHR, *Hassan v. United Kingdom*, Application No. 29750/09, Judgment of 16 September 2014, *available at*: https://www.echr.coe.int/Documents/Reports_Recueil_2014-VI.pdf, para. 77.

Varnava [34] and, more explicitly, in *Hassan* where the confusing statement was made (in para. 107) that "the provisions of Article 5 [ECHR] will be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State".[35] This practice may change in future, as there

[34] ECtHR, *Varnava and Others v. Turkey*, Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009, *available at*: https://hudoc.echr.coe.int/eng#{"itemid":["001-94162"]}, para. 185: "Article 2 [ECHR] must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict", with reference to *Loizidou*, cited above (n 30), para. 43.

[35] See the following paras. in *Hassan*:"105: As with the grounds of permitted detention …, deprivation of liberty pursuant to powers under international humanitarian law must be 'lawful' to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness (see, for example, Kurt v. Turkey, 25 May 1998, § 122, Reports of Judgments and Decisions 1998-III; *El-Masri* [v. The Former Yugoslav Republic of Macedonia (GC, no. 39630/09), https://www.justiceinitiative.org/uploads/3f999faa-16de-452b-a941-aaa1d3323e78/CASE_OF_EL-MASRI_v__THE_FORMER_YUGOSLAV_REPUBLIC_OF_MACEDONIA.pdf], § 230; see also *Saadi v. the United Kingdom* [GC], no. 13229/03 [https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2213229/03%22%5D%7D], §§ 67-74, ECHR 2008, and the cases cited therein)."106. As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment 'shall be subject to periodical review, if possible every six months, by a competent body'. Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent 'court' in the sense generally required by Article 5 § 4 (see, in the latter context, Reinprecht v. Austria, no. 67175/01 [https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2267175/01%22%5D%7D], § 31, ECHR 2005-XII), nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the 'competent body' should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay.

are now thousands of applications by individuals who have raised complaints against Ukraine or Russia or against both countries in relation to the conflict in Eastern Ukraine, and there are also *Ukraine v. Russia* inter-State applications pending in which *lex specialis* rules of international humanitarian law may become relevant:

- *Ukraine v. Russia (V) re Eastern Ukraine* (Application no. 8019/16) on the alleged violation of Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment), Article 5 (right to liberty and security), and Article 6 (right to a fair trial) by Russian forces and armed groups controlled by Russia (transferred to the Grand Chamber),[36] these include
- *Ukraine v. Russia (VII)* (Application no. 38334/18) alleging the politically motivated detention and prosecution of Ukrainian nationals on various criminal charges (pending before a Chamber);
- *Ukraine v. Russia (II)* (Application no. 43800/14) on the alleged abduction of three groups of children in Eastern Ukraine and their temporary transfer to Russia on three occasions between June and August 2014 (pending before a Chamber).

III. General Aspects of Jurisprudence in Armed Conflicts

As far as human rights in armed conflicts and IHL are concerned, international jurisprudence is still the exception rather than the rule. Even the execution of national jurisprudence is rare in comparison with allegations of breaches that were made public by non-governmental

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While the applicant in addition relies on Article 5 § 3, the Court considers that this provision has no application in the present case, since Tarek Hassan was not detained in accordance with the provisions of paragraph 1(c) of Article 5."107. Finally, although, for the reasons explained above, the Court does not consider it necessary for a formal derogation to be lodged, the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State. It is not for the Court to assume that a State intends to modify the commitments which it has undertaken by ratifying the Convention in the absence of a clear indication to that effect."

[36] *See* Press Releases issued by the Registrar of the Court 432 (2018) of 17 December 2018 and 303 (2019) of 11 September 2019.

organizations and individuals. There are, of course, policy interests speaking for discretion in the handling of alleged human rights violations, but any government resolved to uphold the rule of law will have to exercise transparency in the prosecution of breaches, as negligence of human rights obligations would be counter-productive for good governance.

This aspect is of particular relevance for the effective execution of robust peace operations.[37] Examples for counter-productive State practice with respect of human rights obligations can be found in Kosovo, where children had become victims of explosive remnants of war in March 2000, years after the end of armed hostilities, without reparation being paid to their parents;[38] in 2001 persons have been detained for more than seven months without court decision;[39] and individual housing rights were not investigated over a period of five years before 2004.[40]

There are undoubtedly many more examples for human rights violations during crisis or war that have not been scrutinized appropriately by responsible States or international organizations. The lack of penal jurisdiction in such matters is notorious, but what may be even more important for victims and the civilian population as such, is the lack of administrative consequences, the lack of reparation, and a lack of reliable perspectives for non-repetition.

IV. Standards for Legal Proceedings

Recently, Annyssa Bellal has emphasized before the Security Council in her presentation on the 70th anniversary of the Geneva Conventions that

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[37] *See* International Society for Military Law and the Law of War (ed), *Leuven Manual on the International Law Applicable to Peace Operations* (Cambridge University Press, 2017), 76-104.

[38] ECtHR, *Behrami and Behrami v. France* (Application No. 71412/01), Judgment of 2 May 2007, *available at*: https://hudoc.echr.coe.int/eng#{"itemid":["001-80830"]}, para. 153.

[39] ECtHR, *Saramati v. France, Germany and Norway* (Application No. 78166/01), Judgment of 2 May 2007, *available at*: https://hudoc.echr.coe.int/eng#{"itemid":["001-80830"]}, para. 153.

[40] ECtHR, *Gajić v. Germany* (Application No. 31446/02), Judgment of 28 August 2007.

there is a need to mainstream IHL in all pertinent legal systems and build bridges between implementing institutions to create efficient, coordinated and more integrated responses to prolonged situations of violence.[41]

Indeed, legal protections against forced disappearances, operational detentions, and likewise against destruction of homes are of increasing significance in military operations. There is a wide consensus today, that in circumstances of military activity the applicable Human Rights Conventions have to be read with international humanitarian law, "but how the two [bodies of law] interrelate is no easy matter".[42] As well explained by the Inter-American Court of Human Rights,[43] human rights bodies have a responsibility to investigate limitations of human rights in armed conflicts which may apply under the *lex specialis* role of international humanitarian law. This challenge should be met by the ECtHR as well. It will not necessarily lead to a non-application of human rights rules in armed conflicts, but to a use of more specific standards of application that are appropriate in the given situation.

How specific human rights principles and rules are to be interpreted if read together with international humanitarian law, needs still to be developed in the jurisprudence of the ECtHR. This will be a question of *ad hoc* evaluation under the given circumstances of the case rather than a matter of general doctrine. Yet the ECtHR apparently tends to avoid addressing the issue explicitly, even when the interpretation of human rights obligations is affected by an armed conflict situation. An exception was the case of *Hassan*.[44] In another case, *Benzer,*[45] it has been pretended in literature that the principle of proportionality was interpreted by the

[41] Strategic Adviser on international humanitarian law of the Geneva Academy of international Humanitarian Law and Human Rights Dr Annyssa Bellal, briefing of the Security Council on 13 August 2019, *available at*: https://www.geneva-academy.ch/news/detail/254-our-strategic-adviser-on-ihl-briefed-the-un-security-council-on-the-geneva-conventions.

[42] Lord Philipps of Worth Maltravers in Daragh Murray *et al.* (eds.), *Practitioners' Guide to Human Rights Law in Armed Conflict,* (Oxford University Press, 2016), vi.

[43] See above (nn. 19-23 and accompanying text).

[44] See above (n. 33, 35 and accompanying text).

[45] ECtHR, *Benzer and Others v. Turkey*, Application No. 23502/06, Judgment of 24 March 2014.

European Court as being distinctly different in international humanitarian law than in human rights law in peacetime,[46] but the Court did not, in fact, even refer to international humanitarian law in this case. It confined itself to the text of Article 2 ECHR,[47] without examining whether and to what extent this human rights rule is informed by international humanitarian law. As Louise Doswald-Beck has explained, "in HRL, proportionality is applied to the use of force as a whole, and not just to the extent of incidental damage to civilians", whereas "proportionality of collateral damage" (which is relevant under IHL) "has not in practice been the basis of human rights judgments in cases relating to bombardments".[48] The latter statement has been confirmed and critically commented in a recent report.[49]

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[46] Murray *et al.* (eds.), at 133, with reference to *Benzer,* para. 163.

[47] *Benzer,* para. 163: "The text of Article 2 of the Convention, read as a whole, demonstrates that it covers not only intentional killings but also situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor, however, to be taken into account in assessing its necessity. Any use of force must be no more than 'absolutely necessary' for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is 'necessary in a democratic society' under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (ibid, §§ 148-149)". The arguments used by Murray *et al.* that while in international humanitarian law proportionality referred to a balance between anticipated military advantage and expected incidental civilian damage (Art. 51 para. 5 lit. b AP I), whereas in international human rights law, proportionality required that any use of force be proportionate to the aim of protecting life neglects that even in armed conflicts the principle of proportionality is not strictly confined to foreseeable damage, but requires taking active precautions, considering that in cases of doubt an object which is normally dedicated to civilian purposes shall be presumed not to be used to make an effective contribution to military action (Art. 52, para 3 AP I), even if the commander's decision must be taken on the basis of all information available at the time. In any event, an attack must be cancelled if it becomes apparent that the target is not a military objective.

[48] Louise Doswald-Beck, "Human rights law and nuclear weapons", in Gro Nystuen *et al.* (eds.), *Nuclear Weapons Under International Law* (Cambridge University Press, 2014), 435-460, at 449 and 450.

[49] Geneva Academy of International Humanitarian Law and Human Rights, *Implementing International Humanitarian Law through Human Rights Mechanisms: Opportunity or Utopia?*, *available at*: https://www.geneva-academy.ch/joomlatools-

A few weeks ago the Human Rights Committee has stated that the use of lethal force consistent with international humanitarian law is generally not arbitrary.[50] This excludes in practice the application of the right to life where States act in compliance with international humanitarian law. Hence human rights bodies are called to apply international humanitarian law in armed conflict cases; otherwise they would not be in a position to convincingly decide on the arbitrariness of the use of force.

It will not be easy to develop bright line rules to explain the distinction between human rights law and international humanitarian law in practice. Nevertheless, that distinction exists, and human rights bodies remain challenged to elaborate on it in their jurisprudence.

V. Conclusions

In military operations during armed conflicts human rights law and international humanitarian law are complementary. The application of human rights norms is informed by the *lex specialis* character of international humanitarian law. This relationship should be considered by the ECtHR more explicitly:

(1) The concurrent application of the two systems of protection requires in armed conflict situations to take international humanitarian law into consideration when interpreting and applying a rule of human rights law.

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files/docman-files/Implementing%20International%20Humanitarian%20Law%20Through%20Human%20Righ.pdf, October 2019. At p. 18. For a thorough evaluation of "how the right to life applies during armed conflicts" *see* Ian Park, *The Right to Life in Armed Conflict* (Oxford University Press, 2018), 101-176.

[50] Human Rights Committee, General Comment No. 36 (30 October 2018), para. 64: "… Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields, would also violate article 6 of the Covenant."

(2) As the use of lethal force consistent with international humanitarian law is generally not unlawful, the ECtHR is called to apply international humanitarian law to convincingly decide whether the use of force is "absolutely necessary" in accordance with Article 2 (2) ECHR.

(3) The same applies with regard to the lawfulness of detentions in accordance with Article 5 ECHR.

(4) Human rights bodies may — and should — thus provide support to ensure respect for international humanitarian law.

(5) The reluctance of the ECtHR, to qualify a situation as an armed conflict, impairs the convincing application of human rights in armed conflicts and should be overcome..

Annex

Bakhtiyar Tuzmukhamedov

Treaty Bodies and International Humanitarian Law Implementation — A Formal View at Tools and Cadre*

May I start with a standard disclaimer to the effect that whatever I may say here today can strictly be attributed only to the speaker and not to any persons or entities that I may be associated or affiliated with.

In my brief remarks I shall take a formal look at human rights treaty bodies, and try to form an opinion whether, by virtue of their establishment, tools and cadre with their expertise and experience, these institutions are fit to play a role in IHL implementation.

Let's apply to treaty bodies the three components of the term "International Humanitarian Law".

Are treaty bodies international?

Of course they are. They are international by virtue of international nature of their founding instruments, whether a covenant, a convention, an optional protocol, or a resolution of a principal organ of the United Nations.

They are international by virtue of their mandates conferred by founding documents, and by virtue of scope and reach of their activities.

"Ay, there's the rub."[1] — ironically, one treaty body of eighteen members, which monitors compliance with two optional protocols to the principal

* Remarks at the Conference "The Role of Human Rights Mechanisms in Implementing International Humanitarian Law (Geneva Conventions)", organized by the University of Geneva Faculty of Law in partnership with Geneva Academy of International Humanitarian Law and Human Rights, the Federal Department of Foreign Affairs, the Canton of Geneva and the Office of the United Nations High Commissioner for Human Rights, Geneva, 14-15 November 2019.

[1] William Shakespeare, *Hamlet, Prince of Denmark*, Act III, Scene I.

instrument, has four members, who have been nominated by states which are not parties to either of the two protocols, and another three members from states which are not parties to one of the two.[2]

Treaty bodies are international by virtue of forming of their composition by international fora. The process is expected to ensure that no two members of a body are nationals of the same state thus broadening representation. But unlike at the European Court of Human Rights, here states nominate a single candidate each, thus narrowing the choice. A further requirement may be spelled out in the founding instruments, that for the purposes of election, due consideration should be given to "equitable geographical distribution"[3] and to the "representation of principal legal systems"[4] and even of "different forms of civilization".[5]

That requirement is not standard throughout founding instruments. Moreover, you may find some treaty bodies where these requirements are not fully observed. Look at the Committee Against Torture through the lens of the UN system of distribution of regional groups.[6] The new composition of the Committee, which will convene in April 2020, will have three experts from the Eastern European Group, three or two, depending on how you count Turkey, — from the Western European and Others Group, one or two, again depending on how you count Turkey, — from Asia-Pacific Group, two from Latin American and Caribbean Group, and one — from African group. There will be no North Americans or Africans from areas east of the Nile and east or south of the Sahara. And while the Convention Against Torture does not require representation of principal legal systems, still, there will be no formal presence of common law system. Although there is a caveat here: one member of the Committee teaches in a common law state, is very much familiar with that system of law and, in

[2] Membership of Human Rights Committee as of the time of its 127th Session, 14 October — 8 November 2019, *available at*: https://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx.

[3] *E.g.*, ECOSOC Resolution 1985/17 para (b); Convention on the Elimination of All Forms of Discrimination against Women, Art. 17(1).

[4] Convention on the Rights of the Child, Art. 43(2).

[5] International Convention on the Elimination of All Forms of Racial Discrimination, Art. 8(1).

[6] https://www.un.org/depts/DGACM/RegionalGroups.shtml.

fact spends there time which is, to say the least, comparable to the time he resides in the country of citizenship.

In that sense, the Optional Protocol to the Convention Against Torture stands out where it adds a restrictive proviso that, while forming the Subcommittee on the Prevention of Torture, due consideration be given "to the representation of different forms of civilization and legal systems of *States Parties*".[7]

Treaty bodies are made international due to their links with and ties to the United Nations. While legally independent, treaty bodies heavily rely on the UN for professional and administrative support. Not only do they meet on the United Nations premises, they also lean on human rights officers, general service staff and many others. Needless to say, they are funded from the UN budget. Malaise of the Organization affects treaty bodies, as illustrated by repercussions of the ongoing financial troubles of the UN.

Are treaty bodies humanitarian?

Yes they are — in a sense that they are tasked with monitoring compliance with international instruments designed to promote and safeguard human welfare in multiple dimensions, both with respect to groups and rights they focus on.

They are humanitarian by virtue of requirements to their composition which should consist of persons not only of high moral standing, but also with recognized competence in the field of human rights, as practitioners of multiple facets, or academics.

Are they humanitarian in a sense of being capable to extend a helping hand to those in urgent need?

No they are not. They are not the International Committee of the Red Cross[8] or *Médecins sans frontières*[9] who can rapidly deploy to disaster areas, whether natural or human-made, to deliver urgently needed aid. They are not the UN Security Council which cannot always contain a crisis,

[7] Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 5(2), *emphasis added*.

[8] https://icrc.org/.

[9] https://www.msf.org/.

but at least is able to convene on short notice. Their pace is measured, as is that of international judiciary, but decisions they ultimately reach do not possess the legal force of a judgment, and are not respected more often than decisions of courts. Here's what a state covering vast expanses of western part of Northern Hemisphere recently opined about certain powers of a treaty body: "The Committee's views and interim measures requests are not legally binding in international or domestic law."[10] Or consider a response of a major European state to a suggestion by a treaty body that it amends its legislation with respect to fundamental legal safeguards: "The Government does not perceive a need to amend the relevant legal provisions."[11]

That brings us to the final test: are treaty bodies about law?

They are established by international instruments, most being treaties, and one, as is the case of Committee on Economic, Social and Cultural Rights, — by an authoritative interpretation of a treaty. They are tasked with monitoring of implementation of founding instruments.

But unlike judicial bodies, they do not possess a viable capacity to ensure compliance with obligations undertaken by state parties. They are not formed as courts. There are no public and adversarial hearings of individual communications or other matters. There is no mechanism of enforcement of their decisions.

Moreover, treaty bodies are not required to be composed of experts in law, whether by their education, experience, or expertise. Some founding instruments suggest that in electing membership of treaty bodies consideration should be given "to the usefulness of the participation of some persons having legal experience"[12] or "legal background".[13] How remote is "usefulness" from indispensability? How many legal experts could count as "some persons"?

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[10] Seventh periodic reports of Canada — UN Doc. CAT/C/CAN/7, para. 92.

[11] Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure. Sixth periodic report of Germany — UN Doc. CAT/C/DEU/6, para. 15.

[12] International Covenant on Civil and Political Rights, Art. 28(3).

[13] Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 17(1).

Above all, what is "legal experience" as opposed to "legal background"? When I was in the former Yugoslavia with the UN Peace Forces, I happened to be assigned, as part of my principal duties of a Civil Affairs Officer, as an adviser to a battalion whose commander, prior to becoming a cavalry officer, read law at a renowned university. Would that make him a person with "legal background"? Or consider a distinguished current member of a treaty body who never had any training in law, but as a senior diplomat, negotiated international treaties. Would that make him a person with "legal experience"?

In practice, most treaty bodies, with a single exception of the Committee on the Rights of Persons with Disabilities,[14] demonstrate prevalence, considerable and sometimes overwhelming, of members of legal profession, even though some of them possess expertise in areas other than human rights law or, for that matter, international law. Even when boasting impressive legal experience or legal background, they are, at least *ab initio*, not always experts in matters dealt with by a treaty body they belong to.

Let me amuse you by a quick anecdote, a sort of lawyer's joke. Recently I encountered an insurmountable difficulty trying to explain to a treaty body colleague, who presumably was not devoid of some legal experience, the concept of non-retroactivity of international treaties. He would not believe that international law and the founding treaty would preclude the International Criminal Court from prosecuting alleged offenses committed before the Rome Statute entered into force as such, or with respect to a particular state.

Of course there are three founding treaties and two optional protocols that make references to International Humanitarian Law. Such references may be found in the Convention on the Rights of the Child, even though the term "humanitarian instruments" which appears in Article 22 (1) may be vague. Article 38 definitely addresses International Humanitarian Law in the context of an armed conflict. And of course there is Optional

[14] Membership of the Committee on the Rights of Persons with Disabilities as of the time of its 22 Session, 26 August — 20 September 2019, *available at*: https://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx.

Protocol on the involvement of children in armed conflict which is all about International Humanitarian Law.

Then there is a provision in the Optional Protocol to the Convention Against Torture, which is designed to avoid conflict of applicability of the Protocol vis-a-vis Geneva Conventions and "situations not covered by international humanitarian law".[15]

The term "International Humanitarian Law" also appears in Article 11 of the Convention on the Rights of Persons with Disabilities which obliges States-parties to take all necessary measures to ensure the protection and safety of that vulnerable group in situations of risk, including situations of armed conflict.

Finally, references to International Humanitarian Law will be found in International Convention for the Protection of All Persons from Enforced Disappearance — in its Preamble, Article 16 dealing with non-refoulement to a state where there is a consistent pattern of serious violations of International Humanitarian Law, as well as in Article 43 which is a replica of Article 32 of the Optional Protocol to the Convention Against Torture. Incidentally, all 10 members of the Committee on Enforced Disappearances possess legal backgrounds and legal experience,[16] although not necessarily of immediate relevance to the object and purpose of the founding treaty, or the IHL, for that matter.

Where would all this thread of facts and circumstances bring this speaker? I am fully aware that my opinion may be a target to "slings and arrows of outrageous"[17] critics. And yet, using the method suggested by Emilie Max in her excellent Working Paper,[18] I am wondering whether an

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[15] Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 32.

[16] Membership of the Committee on Enforced Disappearances as of the time of its 17 Session, 20 September — 11 October 2019, *available at*: https://www.ohchr.org/EN/HRBodies/CED/Pages/Membership.aspx.

[17] William Shakespeare, *op. cit*.

[18] Émilie Max, Implementing International Humanitarian Law Through Human Rights Mechanisms: Opportunity or Utopia, Working Paper, Geneva Academy, October 2019, 22 p.

"intermediate conclusion"[19] might be in order, which I should rather frame as a question: shouldn't the cobbler stick to his last? Shouldn't the treaty bodies be saved from being ultracrepidarians, that is, from expressing opinions on matters beyond their mandates and outside the scope of knowledge, or expertise, of their members, for fear of being ridiculed, or even perceived as, or becoming a nuisance?

I conclude my remarks with sincere hope that I have not been too much of a party pooper.

[19] *Ibid*., *e.g.*, at p. 12.

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