

# The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body

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## **Abstract**

*The debate about the simultaneous applicability of international humanitarian law and human rights law also affects human rights treaty bodies. The article first considers the difficulty for a human rights body in determining whether international humanitarian law is applicable; second, it examines the problems in practice in applying the lex specialis doctrine and the question of derogation in this particular context. The author finally outlines the impact of the debate as to the extent of extraterritorial applicability of human rights law.*



## **The debate as to the simultaneous applicability of international humanitarian law and human rights law**

More than twenty years ago the relationship between the law of armed conflict or international humanitarian law (IHL) and human rights law was a matter of academic debate.<sup>1</sup> Since then non-governmental human rights organizations have reported on situations in which IHL was undoubtedly applicable and in some cases

have used an analysis based on it.<sup>2</sup> More recently the International Court of Justice (ICJ) has made three pronouncements on the relationship between the two bodies of rules from which three interrelated propositions emerge.<sup>3</sup> First, human rights law remains applicable even during armed conflict. Second, it is applicable in situations of conflict, subject only to derogation. Third, when both IHL and human rights law are applicable, IHL is the *lex specialis*. It might be thought that these pronouncements resolve the question of the relationship between the two bodies of international law rules. But far from it, even with regard to those states which have not expressed any objection in principle to the three propositions.

## Human rights are applicable during armed conflict

Two states have a long-standing objection to the first proposition and also to the other two. Israel<sup>4</sup> and the United States<sup>5</sup> maintain that when IHL is applicable, human rights law is automatically not applicable. Both states also maintain that human rights law is not applicable extraterritorially, an argument that will be addressed below.<sup>6</sup> Given the position taken by other states, every relevant UN human rights special procedure and every relevant human rights treaty body, internationally and regionally, and given the text of General Assembly and Security Council resolutions referring to both IHL and human rights law, the ICJ's first

- 1 For example, K. D. Suter, 'An enquiry into the meaning of the phrase "human rights in armed conflicts"', *Revue de Droit Pénal Militaire et de Droit de la Guerre*, Vol. 15 (3–4) (1976), p. 393; Henry Meyrowitz, 'Le Droit de la Guerre et les droits de l'homme', *Revue du Droit Public et de la Science Politique en France et à l'Étranger*, Vol. 5 (1972), p. 1059; G. I. A. D. Draper, 'The relationship between the human rights regime and the law of armed conflict', *Israel Yearbook on Human Rights*, Vol.1 (1971), p. 191. It is noteworthy that all these authors would have seen themselves as experts in IHL and not in human rights law. See also Dietrich Schindler, 'Human rights and humanitarian law: interrelationships of the law', *American University Law Review*, Vol. 31 (1982), p. 935, and, more recently, Jochen Frowein, 'The relationship between human rights regimes and regimes of belligerent occupation', *Israël Yearbook on Human Rights*, 1 (1998); Theodor Meron, 'The humanization of humanitarian law', *American Journal of International Law*, Vol. 94 (2000), 239; Heinz-Jochen Heintze, 'On the relationship between human rights law protection and international humanitarian law', *International Review of the Red Cross*, Vol. 86 (865) (2004), p. 789; Ken Watkin, 'Controlling the use of force: a role for human rights norms in contemporary armed conflict', *American Journal of International Law*, Vol. 98 (2004), p. 1, and the special issue on parallel applicability of HR and IHL, *Israel Law Review*, Vol. 40 (2) (2007), especially the contributions by David Kretzmer, Rotem Giladi and Yuval Shany; Cordula Droeger; and Noam Lubell.
- 2 A notable early example was the report by Human Rights Watch (HRW) on the Gulf War 1990–1. Human Rights Watch, *Needless Deaths in the Gulf War*, 1991.
- 3 ICJ, *Legality or Threat of Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 25; ICJ, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106; ICJ, *Case concerning armed activity on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, paras. 216–220.
- 4 Human Rights Committee, CCPR/CO/78/ISR; CCPR/CO/79/Add.93; CCPR/CO/78/ISR, para. 11.
- 5 Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', *American Journal of International Law*, Vol. 99 (2005), p. 119; Human Rights Committee, CCPR/C/USA/3, Annex 1; CCPR/C/USA/CO/3, para. 3. It should be noted that, at the time the United States ratified the ICCPR, it was clear that the HRC regarded the Covenant as applicable even during situations of conflict, but the United States did not enter a reservation to such applicability.
- 6 The two arguments are separate but interrelated in their practical effect. See section 5 below.

proposition is supported by the overwhelming weight of international legal opinion and state practice. The only question would appear to be whether those two states could claim to be ‘persistent objectors’ to the simultaneous applicability of the two bodies of rules. The first difficulty is whether it is possible to be a ‘persistent objector’ to this type of rule – a rule about the relationship between two sets of rules, rather than a substantive norm regulating behaviour. A more serious difficulty is the basis of the doctrine. Any expression of the principle is usually based on the statement of the ICJ in the *Fisheries* case.<sup>7</sup> In that case, the Court did not take as its sole reference the objection of Norway to the usual practice for the delimitation of baselines, but, on the contrary, emphasized the importance of the reaction of other states.<sup>8</sup> It was the acceptance of the divergent behaviour by other states and specifically the applicant state that prevented the latter from being able to rely on the normal rule. International law has not yet fully adapted its rules to the existence of independent mechanisms, but it is clear that if the treaty bodies play a role equivalent to that of states, they have certainly not accepted the denial by Israel and the United States of simultaneous applicability.<sup>9</sup> For the purposes of this essay, it will be assumed that the ICJ’s first proposition is an accurate reflection of international law.

### The perspective of human rights treaty bodies

The perspective chosen here is that of a human rights treaty body. Others are also affected by the debate as to the simultaneous applicability of IHL and human rights law. They include armed forces, ministries of defence and ministries of foreign affairs. In the human rights field specifically, they include non-treaty mechanisms such as the UN Special Procedures and the Council of Europe’s Commissioner for Human Rights.<sup>10</sup> Among the human rights treaty bodies, the Committee against Torture is dealing with a form of conduct prohibited under both IHL and human rights law;<sup>11</sup> it therefore does not appear to need to take account of the source of the rule. The Committee on the Elimination of Racial Discrimination and the

7 ICJ, *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951.

8 *Ibid.*, pp. 138–9.

9 See generally Françoise J. Hampson, ‘Other areas of customary law in relation to the Study’, in E. Wilmshurst and S. Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, pp. 68–72, and references in notes 4 and 5 above.

10 The most relevant of the Special Procedures in this context are the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, the Working Group on Enforced or Involuntary Disappearances and the Working Group on Arbitrary Detention. Others may occasionally have to deal with the issue. The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is not included, since such treatment is prohibited under both IHL and human rights law. On the Commissioner for Human Rights, see [www.coe.int/t/commissioner/default\\_en.asp](http://www.coe.int/t/commissioner/default_en.asp) (last visited 21 October 2008).

11 Torture or other ill-treatment of detainees is prohibited in the case of prisoners of war (Geneva Convention III, Art. 17), civilian detainees or internees (Geneva Convention IV, Art. 32), detainees not

Committee on the Rights of the Child may occasionally have to deal with issues arising out of situations of conflict, but they are relatively unaffected by the potential overlap. The treaty bodies most affected at the global level are the Human Rights Committee and the Committee on Economic, Social and Cultural Rights and, at the regional level, the African Commission and Court on Human and Peoples' Rights, the Inter-American Commission and Court of Human Rights and the European Court of Human Rights.<sup>12</sup> Those bodies which engage in monitoring a state's compliance with its human rights obligations may make general pronouncements, but they are not required to make a specific finding of violation, which requires a precise analysis of the relationship between IHL and human rights law. For that reason, the focus will be on the most affected treaty bodies, not including the Committee on Economic, Social and Cultural Rights.<sup>13</sup>

The first aspect to be considered will be the difficulty for a human rights body in determining whether IHL is applicable; second, the problems in practice in applying the *lex specialis* doctrine; third, the question of derogation in this particular context; and, finally, in brief, the impact on the first two of the debate as to the extent of extraterritorial applicability of human rights law.

## Determining the applicability of international humanitarian law

If a human rights body is to take account of IHL in some way, it must first determine its applicability. Unfortunately, in many cases that is far from obvious.

### Conflict between two states

In the event of an alleged armed conflict between two states it may, comparatively speaking, be sometimes – but not always – fairly straightforward to determine the

otherwise protected (Additional Protocol I of 1977, Art. 75) and all those detained in non-international armed conflict (Common Art. 3 of the Geneva Conventions and Protocol II of 1977, Art. 4).

- 12 On the Human Rights Committee, see [www2.ohchr.org/english/bodies/hrc/index.htm](http://www2.ohchr.org/english/bodies/hrc/index.htm) (last visited 21 October 2008); the Committee on Economic, Social and Cultural Rights, available at [www2.ohchr.org/english/bodies/cescr/index.htm](http://www2.ohchr.org/english/bodies/cescr/index.htm); the African Commission, available at [www.achpr.org/english/\\_info/news\\_en.html](http://www.achpr.org/english/_info/news_en.html); the African Court does not yet appear to have made any pronouncements, see [www.aic-tcia.org/courts\\_conti/achpr/achpr\\_home.html](http://www.aic-tcia.org/courts_conti/achpr/achpr_home.html); the Inter-American Commission, available at <http://cidh.oas.org/DefaultE.htm>; the Inter-American Court, available at [www.corteidh.or.cr/index.cfm?CFID=367321&CFTOKEN=81159529](http://www.corteidh.or.cr/index.cfm?CFID=367321&CFTOKEN=81159529); and the European Court of Human Rights, available at [www.echr.coe.int/echr](http://www.echr.coe.int/echr) (all sites last visited 20 October 2008).
- 13 Bodies with a monitoring function usually issue General Comments, setting out their interpretation of a right or concept in the treaty in question, and will also provide Concluding Observations following the scrutiny of a state's report and the dialogue with state representatives. Generally speaking, although there are exceptions, only if a human rights body has to deal with individual applications does it have to reach a determination as to whether the treaty has been violated. An Optional Protocol to the ICESCR was adopted without a vote on 18 June 2008, annexed to a resolution of the Human Rights Council (A/HRC/8/L.2/Rev.1/Corr.1). If the General Assembly adopts the text, it will provide for the right of individual petition when it enters into force.

applicability of IHL. Article 2 common to the four Geneva Conventions of 1949 stipulates that the Conventions shall apply

to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

No declaration of war or recognition of the state of war between the two states is required,<sup>14</sup> and no minimum threshold for the amount or quality of force used is specified. Clearly, this suggests that any use of armed force *against* a state triggers an armed conflict.<sup>15</sup> This still leaves open the question of whether every use of armed force *in* the territory of another state, including its territorial waters and airspace, is necessarily *against* the state. The ICRC *Commentary* suggests,

A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression ‘armed conflict’ makes such arguments less easy.<sup>16</sup>

Whilst a state clearly cannot, simply by manipulating terminology, avoid the applicability of IHL, there have to be objective reasons for believing that the party in question is in fact engaged in an armed conflict. This is usually manifested by evidence of an *animus belligerendi*,<sup>17</sup> which in turn suggests that it is possible to have an alternative *animus*. The obvious possibility is a form of extraterritorial law enforcement, for instance hot pursuit, which starts in the national territory and continues into the territory of another state. Extraterritorial law enforcement could also include action by armed forces against persons or entities in another state which have engaged and continue to engage in international crimes against the first state and where the other state is unwilling or unable to take action against them. In this context, the question is not whether such action is lawful or unlawful or whether the first state could invoke self-defence. Just because the state is presumably acting in self-defence does not necessarily make the action an armed conflict. One example of such a situation would have been the military strike by Predator drone in Yemen, at least if it had been conducted without the consent of the

14 ICRC, Commentaries to the Geneva Conventions of 1949, common Art. 2, available at [www.icrc.org/ihl.nsf/COM/365-570005?OpenDocument](http://www.icrc.org/ihl.nsf/COM/365-570005?OpenDocument) (last visited 20 October 2008). This was important in the case of the Falklands/Malvinas conflict, to which Margaret Thatcher, the UK Prime Minister, initially stated that the Geneva Conventions were not applicable as there had been no declaration of war. This view was rapidly corrected.

15 E.g. the border clash between Ecuador and Peru in 1997; see John R. Groves, ‘Effective engagement; the case of Ecuador’, *Joint Force Quarterly*, Autumn 2000, p. 46, available at [www.dtic.mil/doctrine/jel/jfq\\_pubs/1026.pdf](http://www.dtic.mil/doctrine/jel/jfq_pubs/1026.pdf) (last visited 21 October 2008).

16 See above note 14, Art. 2(1).

17 Yoram Dinstein, *War, Aggression and Self-Defence*, Cambridge University Press, Cambridge, 4th edn, 2005, pp. 14–15.

Yemeni authorities.<sup>18</sup> Another example would be the recent use of force by members of the Colombian army against members of the Revolutionary Armed Forces of Colombia (FARC) in Ecuador.<sup>19</sup> Given the incidence of transnational terrorist attacks, such situations may become increasingly common. Whilst the characterization of the use of force between two states as an armed conflict is generally uncontroversial, it seems clear that it is not always without difficulty.

A second and more unusual type of example is where violence occurs in occupied territory. At what point does that change from being a law and order problem, in relation to which the occupying power has an obligation to restore order,<sup>20</sup> and become an armed conflict? Does such a decision have any effect on the status of a territory as being occupied?<sup>21</sup> Is a conflict within occupied territory international or non-international?

### Non-international armed conflict

Far more difficult in practice is a determination that a situation within a state constitutes an armed conflict. The boundary in this case lies between disorder and/or organized political violence and armed conflict, giving rise to three difficulties. First, at what point does the law deem that the violence has crossed that threshold? Second, how are the facts to be accurately determined? Third, of what relevance, if any, is the state's refusal to accept that what is occurring is an armed conflict?

Article 3 common to the 1949 Geneva Conventions just refers to an 'armed conflict not of an international character', thus implying that any armed conflict which does not come within Common Article 2 comes within Article 3. That is consistent with the wording, but it appears that at the time of its negotiation Common Article 3 was intended to apply to internal conflicts.<sup>22</sup> Thus the question of what is an armed conflict remains unresolved, for again there is no minimum threshold. Protocol II of 1977 gives some clarification in its Article 1, which claims to 'develop and supplement' Common Article 3 'without modifying

18 It is not clear whether the issue of consent is relevant to the characterization of the attack as constituting an armed conflict although, if the attack does constitute an armed conflict, consent would be likely to affect the characterization of the conflict; see further below.

19 1 March 2008; see 'Colombia's cross-border strike on FARC irks neighbors', *Christian Science Monitor*, 3 March 2008, available at [www.csmonitor.com/2008/0303/p04s02-woam.html](http://www.csmonitor.com/2008/0303/p04s02-woam.html) (last visited 21 October 2008). A statement of the Colombian Foreign Ministry said that 'Colombia did not violate sovereignty but acted according to the principle of legitimate defense'.

20 E.g. the situation which has arisen in the Israeli-occupied Palestinian Territories since 2000 during the second intifada.

21 In order for territory to be occupied, it must be under the 'authority' of the occupier. 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Annex, Art. 42. It could be argued that a decision that there is an armed conflict necessarily means that the occupier does not exercise the requisite control. It is submitted that this is an oversimplification. In many internal armed conflicts, the state continues to exercise the control necessary, for example, to provide basic services to the population. It is suggested that, where conflict breaks out in occupied territory, it should be a matter of fact and not of law whether the occupier remains in control of the territory as a whole.

22 ICRC Commentaries, above note 14, common Art. 3, pp. 49–50.

its existing conditions of application'. This suggests that the applicability of Common Article 3 is unaffected, but does not preclude the possibility that Protocol II applies only to some of the armed conflicts that come within Common Article 3. The provision that

This Protocol shall not apply 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<sup>23</sup>

appears to clarify the situations in which Common Article 3 is applicable. However, the first paragraph of the said Article 1, which creates new requirements with regard to the parties and the degree of control exercised over territory, is clearly only applicable in the context of Protocol II itself. The sole guidance found in the treaty law is therefore that riots and isolated and sporadic acts of violence do not constitute armed conflict. That does not establish what *does* constitute armed conflict.

Further clarification has been provided by the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY). The Court has held that

An 'armed conflict' is said to exist 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.<sup>24</sup>

This suggests that there is a temporal element to an armed conflict which may not be present in other violent activity. It also requires that there be some degree of organization of the group or party. Individuals acting individually cannot transform violence into an armed conflict. It is probably unrealistic to expect the law to clarify the applicability of Article 3 further. The difficulty does not usually lie with the law, but with the facts.

Where there are organized groups and where at least some of the members of such groups are armed and engage in acts of violence, there may be – but there is not necessarily – an armed conflict. To cite but one example, it was difficult to characterize the situation during the 'Troubles' in Northern Ireland.<sup>25</sup> There were certainly organized armed groups which were able to engage in terrorist attacks. But were the attacks sporadic, and therefore outside Common Article 3, or do sporadic attacks over a long period constitute protracted armed violence? In many such situations, significant numbers may support the armed groups politically and/or emotionally, but there may well be only a limited number of actual fighters.

23 Protocol II of 1977, Art. 1(2) (emphasis added).

24 ICTY, *Prosecutor v. Kunarac, Kovac and Vokovic*, Case No. IT-96-23 and IT-96-23/1 (Appeals Chamber), 12 June 2002, para. 56, citing *Prosecutor v. Tadic*, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

25 The UK Foreign and Commonwealth Office maintained that at no time did the situation cross the threshold of common Art. 3. Other authorities have suggested, off the record, that at certain times and in certain places, the situation may have crossed the threshold.

There are circumstances in which people may, objectively and in good faith, reach different conclusions on the same set of facts.

A human rights body will have to address such issues in order to determine whether IHL is or is not applicable. It could consult the state in question, but that is likely to be highly problematic. First, IHL is, or is not, applicable as a matter of law, and not because a state recognizes its applicability.<sup>26</sup> Second, states have political reasons for denying internationally that the situation has in fact crossed the threshold set by Common Article 3. Such an admission would invite international attention. It might appear to suggest that the state was losing control of the situation. A state might also be concerned that such an admission would confer some type of legitimacy on the armed group(s), notwithstanding explicit provisions to the contrary.<sup>27</sup> The state is not bound to take the same position internationally with regard to the conflict as do its domestic courts.<sup>28</sup>

## Classification of the conflict

It is not enough for the human rights body to determine that it is dealing with an armed conflict. It then has to determine which set of IHL rules apply to the situation. As already suggested, the applicability of IHL is affected by whether the conflict is international (i.e. between two states) or non-international. There are a wide variety of situations in which the classification of a conflict as international or non-international may give rise to difficulties. Was the war in Lebanon in 2006 two conflicts, one international against Lebanon and the other non-international against Hezbollah, or was it one conflict? If it was the latter, was it international or non-international?<sup>29</sup> Similar but not identical issues arise in relation to the Colombian operation in Ecuador during which certain members of the FARC were killed and others captured.<sup>30</sup> Or again, how should the conflict(s) in Afghanistan be classified? Is there a continuing conflict in the border area between Afghanistan and Pakistan and, if so, is it against the Taliban or al Qaeda? Is the International Security Assistance Force (ISAF), which is present on the basis of the Afghan

26 See, e.g., Article 2 of the Geneva Conventions of 1949.

27 Common Article 3 of the Geneva Conventions of 1949, and Article 3 of Protocol II of 1977.

28 For example, the Russian Constitutional Court characterized the first Chechen war as coming within not merely common Article 3, but Protocol II. It also pointed out that the Russian Federation had adopted no domestic legislation enabling it to give effect to Protocol II. See Judgment of the Constitutional Court of the Russian Federation of 31 July 1995 on the constitutionality of the Presidential Decrees and the Resolutions of the Federal Government concerning the situation in Chechnya, European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1.

29 Human Rights Watch set out the arguments on both sides in *Why They Died: Civilian Casualties in Lebanon during the 2006 War*, Vol. 19 (5) (E), September 2007. Amnesty International cited provisions only applicable in international conflicts, without providing an explanation. Amnesty International, *Israel and Hizbullah Must Spare Civilians: Obligations under International Humanitarian Law of the Parties to the Conflict in Israel and Lebanon*, MDE 15/070/2006, 26 July 2006. The Commission of Inquiry on Lebanon, established by the Human Rights Council, characterized the conflict as international, without explanation or discussion. Human Rights Council, Commission of Inquiry on Lebanon, A/HRC/3/2, 23 November 2006, para. 12.

30 Above note 19.



government's consent, fighting a non-international armed conflict? Are the two conflicts separate or one and the same?<sup>31</sup> Similar issues arose in Iraq after the transfer of authority from the Coalition Provisional Authority to the Iraqi Interim Government. If the consent of the territorial state is decisive, then presumably it is only valid where the consent is given prior to the operation and is genuinely free and informed.<sup>32</sup> Where a peace support operation (PSO) is present without the consent of the sovereign, is any conflict between the PSO forces and local forces international or non-international? This is not an exhaustive list of situations in which classification of the conflict may be problematic.

The importance of classifying a conflict depends on the significance the distinction would have in terms of the substantive law applicable to the two types of conflict. If the rules were 90 per cent the same in the two situations, the importance to a human rights body of correctly classifying the conflict would diminish. There is detailed treaty regulation of international armed conflicts, but only limited regulation in treaty law of non-international armed conflicts. That is particularly true of rules on the means and methods of combat. Over the past fifteen years it has become clear that there is a significant body of customary law relevant to non-international armed conflicts. The ICTY has suggested that many of the rules applicable in international conflicts are applicable in non-international conflicts and has made findings regarding specific rules.<sup>33</sup> But this does not necessarily represent the accepted view amongst the community of states. A better guide may be the Statute of the International Criminal Court (ICC), which includes a list of war crimes in non-international armed conflicts.<sup>34</sup> That list is, however, significantly shorter than the list which would be derived from the case law of the ICTY. Most notably, according to the ICC Statute, engaging in indiscriminate attacks is a war crime in international but not in non-international conflicts. It might be argued that the ICC Statute only defines crimes within the jurisdiction of the Court. That would not prevent an activity not included in the Statute from being regarded as a crime under customary international law. If one departs from the list in the Statute, however, how is one to establish whether states accept that act is an international crime?

Another source of guidance is the ICRC study on customary international humanitarian law.<sup>35</sup> The materials contained in Volume II, on actual practice, are a

31 In the case of coalition operations (e.g., ISAF), a further question is whether the members of the coalition agree between themselves as to the characterization of the conflict.

32 If the attack in Yemen (see 'CIA 'killed al-Qaeda suspects' in Yemen', BBC, 5 November 2002, available at [http://news.bbc.co.uk/1/hi/world/middle\\_east/2402479.stm](http://news.bbc.co.uk/1/hi/world/middle_east/2402479.stm) (last visited 21 October 2008)) was an armed conflict, it would be important to know whether the consent of the Yemeni government was obtained prior to the operation and whether it was freely given. See Human Rights Committee, CCPR/C/SR.2282, para. 43.

33 *Tadic*, above note 22, and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005, I, ch. 44.

34 Statute of the International Criminal Court, Art. 8(2)(e).

35 Henckaerts and Doswald-Beck, above note 33.

useful basis for constructing an argument. The conclusions reached in Volume I's analysis of customary law, however, have not been without controversy.<sup>36</sup>

When a human rights body has determined that IHL is applicable, is it to use customary law to determine what rules thereof are to be applied? If not, there is a significant difference in the degree of regulation of international and non-international conflicts. If it can use customary IHL, there is allegedly a much greater degree of similarity in the two sets of rules, but the conclusions of the treaty body are more likely to be controversial.

### **The relationship between the two bodies of rules – the *lex specialis***

As noted above, the ICJ has suggested that where both human rights law and IHL are applicable, IHL is the *lex specialis*. The first issue concerns the meaning of this phrase, and the second relates to how a human rights body is to translate the ICJ's formulation into practice.

The full expression is *lex specialis derogat legi generali*.<sup>37</sup> It is not clear whether this means only that the special prevails over the general, or whether it means that the former actually displaces the latter. There are certain situations in which the law may deal both with the general and the specific. One example would be the case of tenancies. A legal system may contain general rules relating to tenancies generally. It may contain specific rules concerning particular types of tenancies, such as commercial or agricultural tenancies. If there are gaps in the latter regimes, they will be filled in with the generally applicable tenancy rule relating to the matter at issue. That suggests that there is a vertical relationship between the general and the special. The general is at the bottom and is the default position. The special is a subdivision of the general and is above it. One general regime may give rise to several special regimes.<sup>38</sup>

### **Different, but overlapping areas of law**

The relationship between human rights law and IHL, however, involves a different problem. It concerns different areas of law whose boundaries may, over time, come into collision with one another. Within English law, the obvious example is the law of contract and the law of tort, or civil wrong. Where harm is inflicted on a person allegedly as a result of inadequate performance of a contract, should the action be

36 John B. Bellinger III and William J. Haynes II, 'A US government response to the ICRC study *Customary International Humanitarian Law*', *International Review of the Red Cross*, Vol. 89 (866) (2007), pp. 443–71.

37 Trans: 'the more specific law has precedence over the more general law'. It is not clear whether this principle only applies where there is a conflict between the two rules.

38 See generally, Nancie Prud'homme, '*Lex specialis*: oversimplifying a more complex and multifaceted relationship?' *Israel Law Review*, Vol. 40 (2) (2007), pp. 355–95.

for breach of contract or for negligence, a tort? The problem involves a horizontal relationship and not a vertical one. It is a normal feature of any legal order, where fields of law evolve over time and where the subject matter with which the rules have to deal itself evolves. Examples exist in international law. Naval forces are used to dealing with the relationship between the law of the sea and IHL; the relatively settled relationship between the two is simply a reflection of the fact that the question of the boundaries between the two arose earlier and has, for the most part, been resolved. There is no reason to believe that, in fifty years' time, the same will not be true of the relationship between human rights law and IHL. There is, however, one important difference. States worked out the relationship between the law of the sea and IHL through state practice and through negotiations such as those preceding the adoption of the United Nations Convention on the Law of the Sea.<sup>39</sup> Conversely, the relationship between human rights law and IHL is not exclusively an inter-state affair. First, human rights law concerns the relationship between the state and those within that state's jurisdiction. Second, the relationship will be worked out by, amongst others, human rights monitoring mechanisms, in part through binding legal judgments. Litigation may be an acceptable way of working out specific answers to specific questions. It is, however, at least at the international level, a remarkably arbitrary and haphazard way of working out a general issue, such as the relationship between two bodies of rules.

### Priority to international humanitarian law?

Whilst the ICJ may not have used the most appropriate formulation, it is clear in general terms what the Court meant. It appears to have meant, first, that where both IHL and human rights law are applicable, priority should be given to IHL. Second, given the ICJ's view that human rights law remains applicable at all times,<sup>40</sup> by necessary implication the ICJ also meant that the human rights body should make a finding based on IHL and expressed in the language of human rights law.

This sounds straightforward, but it does not in fact explain how the *lex specialis* doctrine should work in practice. There are various possibilities.<sup>41</sup> It could be that once IHL is applicable, it is the sole legal basis on which a human rights body can base its decision. Human rights law contains provisions on the right to marry and the right to education, whereas IHL contains no provisions on marriage and very limited provisions on education. Does this mean that when IHL is applicable, there can be no violation of the human rights standards provided there is no violation of the IHL rules? That would, in effect, mean that IHL displaces the

39 It was a striking feature of those negotiations that often the disagreement was within delegations rather than between them. The naval elements in delegations tended to be in basic agreement with one another but disagreed with those representing fishing interests or attempting to enlarge the areas of water over which coastal states could exercise jurisdiction.

40 Above note 3, and see further below.

41 Roberta Arnold and Noëlle Quéniévet (eds.), *International Humanitarian Law and Human Rights Law*, Brill/Martinus Nijhoff, Leiden, 2008.

applicability of human rights law, which is contrary to the express ruling of the ICJ that human rights law remains applicable.

### Express provision ?

Another possibility is that IHL prevails where it contains an express provision which addresses a similar field to that of a human rights norm. For example, IHL, at least in the case of international armed conflicts, contains express rules about targeting and precautions in attack. Under the foregoing hypothesis a killing would be an arbitrary killing under human rights law only if it violated the IHL rules. Whilst superficially both plausible and attractive, there are two difficulties with this solution. First, while some rules of human rights law would be significantly affected by IHL, notably the prohibition of arbitrary killing and the prohibition of arbitrary detention, others would be totally, or almost totally, unaffected. There is virtually nothing in IHL, at least not in treaty law, on the right to demonstrate or on freedom of expression. Both, however, may be significantly affected during conflict. Similarly, access to education may be affected, for practical rather than legal reasons, by conflict.

To what extent would the conflict context affect the applicability of human rights law in the absence of specific IHL treaty rules? It would be possible for human rights bodies to take the conflict into account by the way in which they chose to apply the limitation clauses.<sup>42</sup> Are they, however, required to do so? That solution, superficially at least, would be available only where the right in question contains such a clause.

The second difficulty to which this solution gives rise is that referred to above – the role of customary law. In determining whether IHL contains a relevant rule, should the human rights body confine itself to treaty law or should it also consider customary law? This is an absolutely vital question in the field of the most prevalent – the non-international – type of conflict. According to the treaty rules applicable in such conflicts, the law is silent with regard to the permissible grounds for detention and does not contain detailed rules on the precautions to be taken in attack. If the monitoring bodies should only consult treaty rules, that would enable them to apply human rights law to detention and certain killings but would require them to apply IHL to the displacement of the population and to the protection of objects essential to its survival, such as foodstuffs. Such a result would seem surprising, not to say bizarre.

If, however, customary IHL were taken into account, the grounds for opening fire at least would appear to be subject to IHL. The implications of such a

42 Many human rights treaty provisions set out the interest protected and then provide that any limitations must be justified by reference to a list of purposes or goals, which list varies between different articles and different treaties, necessary to the pursuit of the goal in question and proportionate to its pursuit. In this way, human rights law provides a mechanism to establish a balance between the claims of individuals and those of others or the community itself. Limitation clauses must be distinguished from the derogation clause, as to which see further below.

position should be noted. Human rights bodies have been applying human rights law to killings during non-international conflicts and have met with no apparent protest,<sup>43</sup> perhaps partly because in many cases the states in question have denied at international level, however implausibly, that an armed conflict is taking place. If the human rights body were to apply customary IHL, that would frequently entail a reduction in current protection in what is surely one of the most important issues to arise, the protection of the right to life.<sup>44</sup>

### According to the issue?

A possible third solution is that the *lex specialis* would depend upon the precise issue at stake. For example, IHL would be regarded as the *lex specialis*, but where it provided for a fair trial without specifying what that entailed, human rights law would be the law applied to determine the prerequisites of a fair trial. It is one thing for human rights law to be used as guidance, but quite another for it to be regarded as the legally binding rule to which precedence should be given. Another example would be the right to education, which is most likely to be at issue during belligerent occupation. IHL contains little on the actual content of the occupying power's obligation to provide education; moreover, under IHL it is framed in terms of that power's obligation, and not in terms of the right of the occupied population. The suggestion is that, with regard to those aspects of the right not otherwise covered by IHL, human rights law would prevail.

Under the latter, the right contains matters of immediate obligation and others of progressive realization. Human rights law also contains detailed provisions regarding access to education for various types of minorities. This is usually addressed in the Concluding Observations of relevant treaty bodies and in their General Comments. Are these part of human rights law, or are only the treaty provisions part thereof? The third solution implies a list of ever more specific issues until the precise question is reached, the answers to which would be found sometimes in human rights law and sometimes in IHL. Human rights law is capable of working in this way, since it is principally designed to be applied after the event and has the tools within it to be situation-specific.<sup>45</sup> IHL, on the other hand, is principally designed to be applied at the time a decision is taken and has to provide a

43 See, e.g., Human Rights Committee, *Suarez de Guerrero v. Colombia* (45/79), Communication No. R.11/45, 5 February 1979, UN Doc. Supp. No. 40 (A/37/40) at 137 (1982); ECtHR, *Ergi v. Turkey*, 23818/94, Judgment of 28/7/98; ECtHR, *Gulec v. Turkey*, 21593/93, Judgment of 27 July 1998; ECtHR, *Isayeva and others v. Russia*, 57947-9/00, Judgment of 24 February 2005; Inter-Am.Ct.H.R. (Ser. C), *Case of Plan de Sánchez Massacre v. Guatemala*, Judgment of 29 April 2004.

44 See generally CUDIH, 'Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation', 1–2 September 2005, available at [www.adh-geneve.ch/recherche/pdf/travaux/5/rapport\\_droit\\_vie.pdf](http://www.adh-geneve.ch/recherche/pdf/travaux/5/rapport_droit_vie.pdf) (last visited 20 October 2008).

45 It is not being denied that knowledge of human rights law may enable a state to act so as to avoid a subsequent finding of violation of human rights law. The state can generally predict the elements which will be considered relevant but it may not always be able to evaluate those elements in such a way as to reach the same conclusion as a human rights body.

general rule applicable in a type of situation.<sup>46</sup> It cannot be as fine-tuned to the particular situation as can human rights law. The third solution is, quite simply, impractical. It is also inconsistent with the ICJ statements which identify only IHL as the *lex specialis*.

The solution to the *lex specialis* problem in practice has to be capable of being applied by those involved at the time they act or take decisions. It cannot be determined after the event, even if that is when it is enforced. It is probable that the military would prefer the first solution and human rights activists the third. This may suggest that the second solution is a suitable compromise but, as was shown, it is not without difficulties. It is important that there should be agreement both by states and by human rights bodies. Some way needs to be found to develop a coherent approach to the problem.

## Application of international humanitarian law by a human rights body

The ICJ has stated that in situations of conflict human rights law remains applicable, subject only to derogation.<sup>47</sup> Derogation is a means by which a state may modify, but not extinguish, the scope of certain of its human rights obligations.<sup>48</sup> In other words, it is possible that when called upon to apply IHL, the human rights body will not be applying human rights law in its entirety. The subject under consideration here is not derogation in general, but rather the implications of derogation for the relationship between human rights law and IHL.

### Derogation

In a situation of ‘public emergency which threatens the life of the nation’, the state is free under certain human rights treaties to derogate.<sup>49</sup> It is up to the human rights body to determine whether, in the given circumstances, the state can invoke such a provision.<sup>50</sup> In order to do so the state must indicate, through a prescribed channel, that it is seeking to derogate, from which provisions it is seeking to derogate, the measures it has adopted in derogation of its human rights commitments and the necessity for those measures. The state will be afforded a certain

46 Similarly, it is not being denied that IHL is also enforced after the event, as when a state carries out an investigation to determine whether a violation of IHL has been committed and, where necessary, institutes criminal proceedings. The determination that a violation of IHL has occurred will be based on what was known or ought to have been known to the relevant person at the time the decision was taken.

47 Above note 3.

48 See generally Human Rights Committee, General Comment No. 29, CCPR/C/21/Rev.1/Add.11.

49 ICCPR, Art. 4(1). The ECHR derogation clause applies to ‘war or other public emergency threatening the life of the nation’. ECHR, Art. 15(1). The analogous clause in the IACHR provides ‘In time of war, public danger, or other emergency that threatens the independence or security of a State Party’. IACHR, Art. 27(1).

50 ECommHR, *Greek Colonels’ Case*, Ybk 12 bis, 1970.

‘margin of appreciation’ – a wider one for its characterization of the situation and a narrower one in relation to the necessity for the measure.<sup>51</sup> There are precedents both for the state’s characterization of the situation not being accepted<sup>52</sup> and for the necessity of the measure in question being rejected.<sup>53</sup>

Any human rights treaty which provides for derogation also stipulates that some rights are non-derogable. The list varies in different treaties.<sup>54</sup> In addition, the Human Rights Committee stated, in General Comment No. 29, that potentially derogable rights have a non-derogable core.<sup>55</sup> So, for example, whilst the prohibition of arbitrary detention is potentially derogable, it is likely that human rights bodies will treat the provision concerning the right to challenge the lawfulness of detention (*habeas corpus/amparo*) contained within the general prohibition as non-derogable.<sup>56</sup> Those provisions which have a close relationship in practice to a non-derogable principle are likely to be found, in fact, non-derogable.<sup>57</sup> For example, long periods of detention before being brought before a judicial officer facilitate torture or other ill-treatment. That is likely to be taken into account when evaluating the period in question.

State practice with regard to derogation is anything but consistent. Some states have invoked emergency legislation at the domestic level, often for long periods of time, but without derogating at the international level.<sup>58</sup> Some are clearly involved in an armed conflict but have not derogated.<sup>59</sup> Derogation is a facility, not an obligation. Unlike IHL, a derogation is not automatically applicable by virtue of the situation; it has to be invoked.

### *In non-international armed conflicts*

Two separate situations need to be considered in this context: non-international and international armed conflicts. In practice, when a human rights body is dealing with a situation which arises out of non-international armed conflict and there is no derogation, it uses human rights law in its entirety.<sup>60</sup> If the human rights body fails to take account of IHL, there is a real risk that the state will be found responsible for a killing in breach of human rights law which would not have been

51 Rosalyn Higgins, ‘Derogations under Human Rights Treaties’, *British Yearbook of International Law*, Vol. 48 (1976–7), p. 281.

52 *Greek Colonels’ Case*, above note 50.

53 ECtHR, *Aksoy v. Turkey*, 21987/93, Judgment of 18 December 1996.

54 ICCPR, Art. 4(2); ECHR, Art. 15(2); IACHR, Art. 27(2). There is no equivalent provision in the African Charter of Human and Peoples’ Rights.

55 Above note 48.

56 See note 48, para. 16; see also Inter-Am.Ct.H.R., *Habeas Corpus in Emergency Situations* (American Convention on Human Rights, Arts. 27(2), 25(1) and 7(6)), Advisory Opinion OC-8/87, 30 January 1987, (Ser. A) No. 8 (1987).

57 *Ibid.*

58 Human Rights Committee, Concluding Observations, CCPR/CO/76/EGY, para. 6.

59 Russia has derogated from neither the ECHR nor the ICCPR with regard to the situation in Chechnya.

60 E.g., *Isayeva*, above note 43.

unlawful under IHL.<sup>61</sup> This is less of a problem for the Human Rights Committee and the Inter-American Commission/Court of Human Rights than for the European Court of Human Rights. The rules applied by the first three bodies prohibit arbitrary killings and arbitrary detention, but do not define arbitrary. Whilst no derogation is possible from the prohibition of arbitrary killing, the meaning of arbitrary may be affected by the existence of an armed conflict. In other words, it would be possible for those bodies to use IHL to determine whether there was a violation of human rights law, without regard to the question of derogation.<sup>62</sup> If, however, they take account of IHL, they will weaken current levels of protection.

The position is more complicated under the European Convention on Human Rights (ECHR). Article 2 thereof lists the only permitted grounds for opening fire. They are suited to a law and order paradigm, but not to an armed conflict paradigm. In order to bring into play the additional circumstances in which it is lawful to open fire in time of conflict, it would be necessary to derogate. Article 15 expressly envisages that possibility. It provides that there can be no derogation in relation to Article 2 'except in respect of deaths resulting from lawful acts of war'.<sup>63</sup> Article 5 of the Convention similarly lists the only permitted grounds of detention, rather than prohibiting arbitrary detention. If it is sought to introduce a new ground related to a conflict, such as internment or administrative detention, it would be necessary to derogate.<sup>64</sup> Article 5 is potentially derogable, and states bound by the ECHR have in practice derogated from Article 5 when a domestic emergency allegedly necessitated internment or unusually long periods of detention prior to being brought before a judicial officer. No state has ever derogated from Article 2.

The European Court of Human Rights (ECtHR), in other words, cannot use IHL as the framework of analysis for finding a violation of human rights law in the same way as other human rights bodies. It could only do so overtly if the state had derogated, or by saying that IHL was relevant as a matter of law.

61 That does not appear to have happened yet in the Chechen cases before the ECtHR, in that the facts suggest that there has been a violation of both human rights law and IHL.

62 Examples of the constructive use of IHL can be found in the case-law of the Inter-American Commission and Court of Human Rights, such as IACHR, *Abella v. Argentina*, Case 11.137, Report No. 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997), and IACtHR, *Bámaca Velásquez* Case, Judgment of 25 November 2000, (Ser. C) No. 70 (2000).

63 ECHR, Art. 15(2).

64 ECtHR, *Lawless v. Ireland*, 332/57, Judgment of 1 July 1961. It is clear from the reasoning of the Court in *Ireland v. UK*, 5310/71, ECtHR, Judgment of 18 January 1978, that internment in Northern Ireland would have been unlawful but for the notice of derogation. In *Brogan & others v. UK*, 11209/84, Judgment of 29 November 1988, the ECtHR found a violation of Article 5 of the Convention on account of the length of detention (rather than the ground). The United Kingdom then submitted a notice of derogation and detention under the same legislation was subsequently found not to violate the Convention, taking account of the derogation, in *Brannigan & McBride v. UK*, 14553-4/89, ECtHR, Judgment of 24 May 1993. Perhaps the most dramatic example is the Commission decision in *Cyprus v. Turkey*, 6780/74 & 6950/75, ECtHR, Report of the Commission, adopted on 10 July 1976, in which the Commission determined that, in the absence of a notice of derogation, detention of POWs during an international armed conflict was a violation of the Convention.



In non-international armed conflict, however, the state is likely to be denying the applicability of IHL. Furthermore, the need to apply uncertain customary IHL may act as a disincentive. Given that the state is accepting to be judged by a higher standard (human rights law), it might be thought unobjectionable simply to apply human rights law in its entirety. The problem is that that denies the applicability of IHL as a matter of law. It is not a matter of choice.<sup>65</sup>

### *In international armed conflicts*

The position in international armed conflict is more dramatic. In the overwhelming majority of cases there is no doubt as to the applicability of IHL and, more often than not, that means that a significant body of treaty law does apply. At this point the question of derogation and the *lex specialis* interact with another issue, to be considered briefly below – the extraterritorial applicability of human rights law. If human rights law is not applicable extraterritorially, it will still be applicable to the measures taken by a state within its own territory, such as evacuation and measures of civil defence. To the extent that human rights law is applicable extraterritorially, the same questions with regard to derogation arise as in the case of non-international armed conflict.

The case law from human rights bodies addressing international armed conflicts is limited.<sup>66</sup> The Inter-American Commission on Human Rights has only dealt with such situations under the Inter-American Declaration of Human Rights, under which it does not deliver binding legal judgments.<sup>67</sup> There is no provision for derogation from the declaration and no jurisdictional clause. The European Commission of Human Rights has also had to address such a situation. The first and second cases brought by Cyprus against Turkey arose out of the Turkish invasion and occupation of northern Cyprus. Turkey had neither derogated nor declared a state of emergency in relation to Cyprus. The Commission applied Article 5 of the ECHR as it stands and, on that basis, found the detention of prisoners of war to be unlawful.<sup>68</sup> It is submitted that such a result is absurd.

65 Two dissenting members of the Commission in *Cyprus v. Turkey*, *ibid.*

66 In addition to the case law of the Inter-American Commission on Human Rights, acting under the ADHR, see note 67 below, the former European Commission and the European Court of Human Rights have dealt with a number of individual applications against Turkey arising out of the invasion and subsequent occupation of northern Cyprus, most notably *Loizidou v. Turkey*, 15318/89, ECtHR, Judgment of 18 December 1996. Other situations arguably in the international armed conflict category include the position of Russian forces in Transdnistria, ECtHR, *Ilascu & others v. Moldova & the Russian Federation, with Romania intervening*, 48787/99, Judgment of 8 July 2004; and Turkish forces in northern Iraq, ECtHR, *Issa & others v. Turkey*, 31821/96, Admissibility Decision of 30 May 2000, Decision of Second Chamber, 16 November 2004.

67 US operations in Grenada were at issue in IACHR, Disabled Peoples' International, Case 9213, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987) (Annual Report 1986–1987); IACHR, *Coard and others v. the United States*, Report No. 109/99, Case No. 10,951, 29 September 1999, Ann. Rep. IACHR 1999; and the invasion of Panama in IACHR, *Salas and others v. the United States*, Report No. 31/93, Case No. 10,573, 14 October 1993, Ann. Rep. IACHR 1993, 312. The United States disputed the jurisdiction of the Inter-American Commission.

68 Above note 64.

A dissenting minority held that IHL was applicable as a matter of law and had the effect of adding additional permitted grounds of detention, as established under IHL. The only way to avoid an absurd result would be by applying IHL, but under the ECHR that would require states to derogate.

The solution apparently preferred by the Court and, less surprisingly, by member states, is to avoid altogether the applicability of human rights law in international armed conflicts, other than in the context of occupation or extra-territorial detention.<sup>69</sup> This, it is submitted, is even more objectionable. First, it ignores the express finding by the ICJ that human rights law remains applicable even during conflict. Second, it gives rise to an extraordinary result. In non-international armed conflict, where there is no derogation, human rights law will be applied in its entirety, which could result in acts lawful under the applicable rules of IHL being found unlawful under human rights law. In international armed conflict, on the other hand, the conduct of security forces will be exempt from virtually any human rights law controls, including an interpretation of human rights law requirements that takes account of IHL, except in cases of occupation or detention. This difficulty only arises under the ECHR – which does not mean that there are no problems with other human rights treaties. The drafting of the latter, however, does make it easier to take account of IHL, with or without derogation.

## The extraterritorial applicability of human rights law

The question as to how far human rights law is applicable extraterritorially arises purely within that law itself and is not confined to situations of conflict. It may do so, for instance, with regard to acts by consular officials from one state within the territory of another state.<sup>70</sup> However, the only aspect considered here concerns the extraterritorial acts and omissions of a state's armed forces. This issue arises mainly in international armed conflicts, but trans-border activities which are part of a non-international armed conflict may raise a similar issue. Clearly, the importance of the relationship between IHL and human rights law is very significantly reduced if the latter is not applicable extraterritorially. The scope of the extraterritorial applicability of human rights law has consequently received considerable attention in recent years.<sup>71</sup> Whilst certain matters appear to have been resolved, others are

69 See the next section.

70 E.g., ECommnHR, *X v. FRG*, 1611/62, 6 Ybk ECHR 158, p. 169; ECommnHR, *W. M. v. Denmark*, 17392/90, admissibility decision of 14 October 1992. For a comprehensive review of the ECHR case law on the extraterritorial applicability of the Convention, see *Al-Skeini & others v. Secretary of State for Defence*, [2004] EWHC 2911 (High Court), and [2005] EWCA Civ 1609 (Court of Appeal).

71 See generally, Fons Coomans and Menno T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp 2004. This paper does not consider the extraterritorial applicability of human rights law to UN forces or UN-authorized forces. In addition to the issues discussed here, those situations raise the question of who is responsible for the acts of national contingent or a force commander, as to which see ECtHR, *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, 71412/01 and 78166/01, Admissibility decision of 2 May 2007.

still hotly contested. Even those areas where there seems to be some measure of agreement are not unproblematic.

In *DRC v. Uganda*, the ICJ found the same acts to be a violation of both IHL and human rights law.<sup>72</sup> Those acts occurred both in Uganda-occupied territory (Ituri) of the Democratic Republic of the Congo and in territory thereof not occupied by Uganda. The majority judgment does not explain how the Court analysed the scope of the extraterritorial applicability of human rights law.

### In situations of occupation

The ICJ, the Human Rights Committee<sup>73</sup> and the European Court of Human Rights<sup>74</sup> appear to think that human rights law applies in occupied territory in the same way as it applies to the state's own territory. This means that the state has both negative and positive human rights obligations. 'Negative obligations' refers to the obligation of a state not to violate human rights norms itself, also known as the obligation to respect. 'Positive obligations' refers to the state's obligation to protect the individual from foreseeable harm at the hands of third parties, also known as the obligation to protect. Whilst the position appears to be settled, it is not without difficulty. Is the test for occupation the same under IHL and human rights law? It might be argued that, in some respects, IHL fudges the question of when the full range of IHL obligations in occupied territory becomes applicable. Yet the test is clear: effective control is required for a territory to be regarded as occupied.<sup>75</sup> An area may be under the general control of occupying forces, but the position of the occupying power may be challenged to such an extent or in such a way as to make it impossible, in practice, for that power to discharge some of its responsibilities under the Fourth Geneva Convention. A good example would be the status of UK forces in Basra when President Bush announced the end of active hostilities in Iraq.<sup>76</sup> Partly to keep civilian casualties and destruction in the city as

<sup>72</sup> Above note 3.

<sup>73</sup> Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10. When examining some State reports, the HRC has expressly referred to occupation; in other cases, it has described a form of control that amounts to occupation, e.g., areas in Lebanon over which Israel exercised effective control, Concluding Observations, initial report of Israel, CCPR/C/79/Add.93, 18 August 1998, para. 10; contrast, Concluding observations – Lebanon, UN Doc.CCPR/C/79/Add.78, paras. 4–5 (1977), which refers to occupation; and, alleged violations in Lebanon at the hands of Syrian security forces, Concluding Observations, Second report of Syria, CCPR/CO/71/SYR, 24 April 2001, para. 10. The issue of Moroccan control over Western Sahara has been raised principally in the context of the exercise of the right to self-determination. See Concluding Observations, Fourth periodic report of Morocco, CCPR/C/79/Add.113, 1 November 1999, para. 9 and Fifth periodic report, CCPR/CO/82/MAR, 1 December 2004, paras. 8 and 18.

<sup>74</sup> *Loizidou*, above note 66.

<sup>75</sup> Hague Convention IV Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, Art. 42.

<sup>76</sup> In the *Al-Skeini* case, above note 70, certain judges reached the conclusion that Basra was not under the effective control of the British forces for the purposes of the applicability of the European Convention on Human Rights, even though it was probably occupied territory for the purposes of IHL. See also *Al-Skeini*, [2007] UKHL 26, opinion of Lord Rodger of Earlsferry, para. 83.

low as possible, the British forces proceeded cautiously. They were the only force that could be said to be in control. Nevertheless, they were simply not in a position at that time to assume responsibilities for health care, education and so on.

It may be that IHL tacitly recognizes occupation as consisting of different stages and accepts that the scope of the obligations will vary. A state in the process of establishing itself as an occupying power will be described as such, but will not be expected to deliver some of the services which, at a later period, it will be legally required to deliver. The danger is that a human rights body will apply too rigid a test. If human rights law is applicable only to cases of occupation but not otherwise, this appears to necessitate the application of a black and white rule. It does not allow for the possibility that human rights law could be applicable to the extent that the state is able to exercise control over an activity, rather than over the territory as a whole. This is somewhat paradoxical, since in other contexts human rights law is capable of much greater fine-tuning than IHL. It also suggests that human rights bodies may be tempted to describe a situation as occupation when it would not be described as such under IHL, on account of the dramatic consequences of reaching a different conclusion.

It should be remembered that under the hypothesis being examined here, if the state is not in occupation of another state, human rights law is not applicable. The European Court of Human Rights, for example, has suggested in an *obiter dictum* that there may be temporary, and presumably geographically limited, occupation in an application arising out of Turkey's operations in northern Iraq.<sup>77</sup> In its judgment in *Ilascu and others v. Russia, Moldova*, the Court did not expressly find Russia to be in occupation of Transdnistria, but that appears to be the model of responsibility it had in mind when it found Russia responsible for the detention of the applicants.<sup>78</sup> There were particular factual reasons why it was not inappropriate to find Russia responsible.<sup>79</sup> The problem concerns rather the basis for the finding. Now that Georgia, Azerbaijan and Armenia are parties to the European Convention, it is likely that similar issues will arise in relation to areas in the first two states not under their respective control.<sup>80</sup> It is also likely that the European Court of Human Rights will receive applications against the United Kingdom concerning its operations in Iraq, including issues which arose during the period of belligerent occupation.<sup>81</sup> If IHL is the *lex specialis* but human rights law remains applicable, a human rights body should presumably apply IHL to determine whether the situation is one of occupation.

77 *Issa*, note 66 above.

78 ECtHR, *Ilascu and others v. Russia, Moldova*, 48787/99, Judgment of 8 July 2004.

79 Russian personnel had effected the initial detention, even though the applicants were subsequently transferred to Transdnistrian authorities.

80 Georgia has submitted an inter-state application against Russia arising out of the recent conflict between the two states. Individual applications may well be brought against both Georgia and Russia.

81 *Al-Skeini*, above notes 70 and 76. See also UK House of Lords, *Al Jeddah v. Secretary of State for Defence*, [2007] UKHL 58, but it should be noted that he was detained after the passage of SC Res. 1546, 8 June 2004, which suggested that the Security Council, at least, thought that Iraq was no longer occupied, legally speaking.

The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have only had to address the issue more generally in monitoring state reports on implementation. In diverse situations, they have asserted that the human rights obligations of a state also apply in territory under its occupation. That approach has been expressly endorsed by the ICJ. Those bodies have not, however, had to define occupation or to determine whether the definition under human rights law is the same as that under IHL. The drafting of the relevant treaties makes it possible for those bodies, should the need arise, to interpret human rights law in the light of IHL, particularly the Fourth Geneva Convention.

### Detention outside national territory

There also appears to be general acceptance of the proposition that when a state detains a person outside national territory, it is thereby subjecting that individual to an exercise of its jurisdiction.<sup>82</sup> This means that human rights law is applicable, but it is not clear whether it is applicable only to treatment in detention or whether it also applies to the grounds for detention and the circumstances of the detention regime, such as prompt access to a judicial officer to confirm the detention and the ability to challenge the lawfulness of detention. It is striking that both in Iraq and in Afghanistan, states bound by the European Convention have acted as though that treaty is of at least some relevance in those conflicts.<sup>83</sup> In practice, fewer problems appear to arise with regard to detention than to occupation generally. It is evident that the detaining authority exercises whatever the requisite control may be, although that may be shared between different states<sup>84</sup> and may involve UN authorization to detain.<sup>85</sup> Nevertheless, the applicability of the ECHR, in particular, is not without difficulty. As indicated above, it will be necessary for the state to derogate if it wishes to introduce additional grounds for detention that are permitted under IHL, unless the European Court of Human Rights were to invoke IHL as a matter of law. For reasons discussed above, that is less problematic for the other human rights bodies.

Some elements of the circumstances of detention are addressed in general terms by IHL. The texts do not, however, define terms such as ‘court’ or ‘judge’. These terms are not defined in human rights treaty law either, but case law has clarified them. If human rights law is applicable to extraterritorial detention but IHL is the *lex specialis*, what is the status of human rights case law? It is submitted that human rights case law offers useful guidance in such a situation, but that to

82 E.g., Human Rights Commission, *Lopez Burgos v. Uruguay*, UN Doc. A/36/40, 176; Communication No.52/1979, CCPR/C/13/D/52/1979, 29 July 1981; IACHR, *Coard and others*, Report No. 109/99, Case No. 10,951, 29 September 1999, Ann. Rep. IACHR 1999; ECtHR, *Öcalan v. Turkey*, 46221/99, Judgment of 12 May 2005.

83 Above note 81. In Afghanistan, systems have been put in place to provide review of detention.

84 E.g., see *Lopez Burgos*, above note 82.

85 ECtHR, *Behrami and Behrami v. France*, 71412/01, and *Saramati v. France, Germany and Norway*, 78166/01, Grand Chamber, Admissibility decision of 2 May 2007.

regard it as legally binding may be inappropriate.<sup>86</sup> Particularly difficult questions are likely to arise with respect to the end of detention.

## Uncertainty in other fields

In all other areas there is no agreement as to the extraterritorial application of human rights law. Where a person is foreseeably affected by the intentional targeting of a building, is that person within the jurisdiction of the attacking state? Although the latter does not control the territory, it does control the commission of the alleged violation. The test for the extraterritorial applicability of human rights law is that the *victim*, rather than the perpetrator, comes within the jurisdiction in question. Insofar as the victim is foreseeably affected by the act, he or she could be said to be within the jurisdiction of the state responsible for the attack.

The ICJ found that Article 6 of the Covenant on Civil and Political Rights – that is, the prohibition of arbitrary killing – had been violated by Uganda in areas of the DRC over which it did not exercise control. This is inconsistent with the notorious admissibility decision of the European Court of Human Rights in the case of *Bankovic and others v. Belgium and 16 other NATO States*.<sup>87</sup> The approach of the European Court gives rise to apparently arbitrary results. If a person is surrounded by armed forces of a foreign state (de facto detention) and shot dead, the victim is within its jurisdiction. If a person is shot at a distance of fifty metres, when no other forces are in the vicinity, the victim is again presumably under the control of the forces in question and therefore within the attacking state's jurisdiction. How many metres away must the person be to cease to be under the control of the attacking state? It seems surprising that if an aircraft drops two bombs close to but inside the border of an attacked state, those killed within the state will be 'within the jurisdiction'<sup>88</sup> but those killed on the other side of the border will not.<sup>89</sup>

It is submitted that the appropriate test is not control over territory but control over the effects said to constitute a violation, subject to a foreseeable victim being foreseeably affected by the act. It should be remembered that this concerns only the admissibility of an application and not whether a violation will ultimately be found to have been committed. If IHL is applied as the *lex specialis*, there will be a violation of human rights law only if the act would also constitute a violation of IHL. Whilst the general pronouncements of the ICJ and the Human Rights Committee are clear, their practical application is not. The case law of the European Court of Human Rights, which has to address the practical application of any principle, has been said to be inconsistent by the English High Court and

86 See generally, Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', *International Review of the Red Cross*, Vol. 87 (858) (2005), p. 375; see also Henckaerts and Doswald-Beck, above note 33.

87 ECtHR, *Bankovic and others v. Belgium and 16 other NATO States*, 52207/99, Grand Chamber Admissibility Decision of 12 December 2001.

88 ECommHR, *Isiyok v. Turkey*, 22309/93, Admissibility decision of 3 April 1995; Friendly settlement of 31 October 1997.

89 *Bankovic*, above note 87.

Court of Appeal.<sup>90</sup> The European Court is likely to have the opportunity to revisit the issue if applications arising out of British operations in Iraq are submitted.

Speculating as to the cause of the inconsistency of the European case law, it is possible that one or more of at least three elements may be present. First, the judges appear to be fearful of having to come to terms with IHL as a basis for analysis, even if the judgment is expressed solely in terms of human rights law.<sup>91</sup> Second, judges appear to think that were they to hold extraterritorial cases admissible, states would refuse to engage in such operations, even where they are thought to benefit the affected population.<sup>92</sup> In fact, if the Court only found a violation of human rights law in extraterritorial situations where there was a violation of IHL, law-abiding states would have nothing to fear. Third, they probably fear an increase in their already impossible caseload. It is submitted that the solution to the problem of caseload is not to exclude otherwise meritorious cases. The Inter-American Court of Human Rights has shown that it is possible to take a principled approach to these questions.<sup>93</sup> There is an urgent need for discussions between the members of treaty bodies and states to develop coherent principles to determine the scope of the extraterritorial applicability of human rights law in practice.

## Conclusion

Whilst the three propositions that emerge from the advisory opinions and judgment of the ICJ appear straightforward, their application in practice is likely to present real problems for human rights bodies. As a concrete example, it is enough to consider the challenges the European Court of Human Rights will face in addressing the case recently submitted by Georgia against Russia concerning the military operations of August 2008.<sup>94</sup> At the very least, the members or secretariats of the bodies in question will need to be trained in IHL or to use IHL specialists. For a variety of reasons the European Court of Human Rights is likely to come up against particular problems. First, the wording of the provisions on protection of the right to life and detention are only suited to a law and order paradigm. Derogation may be necessary to enable the Court to give effect to IHL as the

90 EWCA, *The Queen on the Application of 'B' & Ors v. Secretary of State for the Foreign and Commonwealth Office*, [2004] EWCA Civ 1344, para. 59; *Al-Skeini*, above note 70, High Court.

91 ECommHR, *Cyprus v. Turkey*, 6780/74 and 6950/75, Report of the Commission, Adopted on 10 July 1976; *Ergi*, above note 43.

92 *Bankovic*, above note 87; *Behrami & Behrami and Saramati*, above note 71.

93 Above note 67.

94 Interim measures were granted on 12 August 2008 under Rule 39 of the Rules of the Court, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=839100&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (last visited 21 October 2008). It should also be noted that the European Court of Human Rights has announced that it has received 2,729 applications from South Ossetians against Georgia; <http://cmiskp.echr.coe.int/tkp197/view.asp?item=13&portal=hbk&action=html&highlight=&sessionId=15237971&skin=hudoc-pr-en> (last visited 27 October 2008).

*lex specialis*, in which case the practice of member states with regard to derogation will need to change. Second, the Court does not have a general monitoring function, but only deals with individual cases. Rather than making general pronouncements, it is obliged to determine the application of any such principle in practice. Establishing the scope of the extraterritorial applicability of human rights law is consequently particularly difficult. That said, it must be emphasized that *all* human rights bodies will encounter some difficulties.

It might be tempting to propose a radical solution: the creation of a right of individual petition for violations of IHL which would be submitted to a new dispute settlement mechanism, and the exclusion of such cases from human rights bodies. This would only work if the ICJ accepted that a rigid distinction had been created between IHL and human rights law. A new problem would then emerge, namely the extent to which the new IHL body could take account of human rights law in determining whether there had been a breach of IHL.

Rather than creating new problems, it might be preferable to attempt to solve the difficulties that arise for existing institutions. The Inter-American Court of Human Rights has shown the way, at least as regards the manner in which IHL can be taken into account. What is needed is a series of meetings bringing together members of the ICJ and of human rights treaty bodies, representatives of states with relevant experience and independent experts to provide solutions to the problems identified. The three propositions of the ICJ would be the starting point and should not be called into question. The meetings should not focus on a particular institution, but rather on a particular issue across all relevant institutions. The test for any solution is that it must be both coherent and practical and should seek to avoid diminishing existing protection. It ought to be possible to achieve a consensus on the implications in practice of the simultaneous applicability of IHL and human rights law.