

THE RELATIONSHIP BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW IN SITUATIONS OF ARMED CONFLICT

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ABSTRACT: International Humanitarian Law (HL) and International Human Rights Law (HR) simultaneously apply during armed conflicts as HR remains applicable in times of war and in areas outside a state's territory. Which provisions apply *in concreto* depends on the degree of "effective control" exercised over a territory. The relationship between HR and HL is regulated by the concept of *lex specialis*: If HL provides more detailed and appropriate provisions in a given warfare situation it overrides the norms of HR. Otherwise, more comprehensive HR standards apply in the light of HL to complement the sometimes fragmentary and undetermined rules of HL. The interaction between HR and HL is mutually supportive. For each body of law offers in some areas, greater protection than the other and has important and constructive contributions to make towards closing gaps with respect to the enjoyment of fundamental rights.

I INTRODUCTION

International Human Rights Law (HR) and International Humanitarian Law (HL)¹ share a common concern: Protecting the individual against unacceptable infringements.² However, due to their different historical roots both bodies of law were considered to accommodate unlike situations and conceived to achieve their common goal with different systematic approaches. HL was designed to protect individuals in armed conflicts between states by imposing obligations and prohibitions on military personnel. On the other hand, HR historically guaranteed defensive rights to protect citizens against abuses by their own government in times of peace.³ Accordingly, the

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¹ Originally, authors differentiated between the law of war dealing with the relation between a state and enemy combatants and, on the other hand, HL aiming at the protection of non-combatants. However, this essay does not follow this differentiation and uses the term HL as comprising both cases.

² René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, Cambridge, UK, New York, 2002) 2, 5; Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 Isr YB Hum Rts 1, 1. Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 9; Inter-American Commission on Human Rights (IACHR), *Abella v Argentina*, OEA/Ser.L/V/II.98. (13 April 1998), para 158.

³ See Provost, *International Human Rights and Humanitarian Law*, above n 2, 7.

relationship between HR and HL was traditionally perceived as mutually exclusive: With the outbreak of war, HR would cease to apply and be ousted by HL.⁴

After the experience of the Second World War, HR and HL began influencing each other's development and increasingly converged. HR in part grew out of HL, particularly the Nuremberg trials.⁵ The acknowledgement by the international community that crimes against humanity existed in customary international law suggested the recognition of corresponding fundamental HR for the individual.⁶ On the other hand, the Universal Declaration of Human Rights,⁷ drafted in the aftermath of the Nuremberg judgements, had some influence on the development of HL through the preparation and adoption of the 1949 Geneva Conventions.⁸ The more recent Geneva Conventions' 1977 Additional Protocols bear even more obvious resemblance to HR treaties.⁹ In 1968 the United Nations (UN), for the first time, acknowledged the convergence of the two legal bodies. The International Conference on HR in Tehran adopted a resolution on "[HR] in armed conflict", which was followed by the adoption of a resolution by the UN General Assembly (GA) later that year.¹⁰ New warfare situations, like the occupations of Northern Cyprus by Turkey and the Palestinian territories by Israel, ultimately challenged the traditional view of a strict separation of HR and HL.

However, although international legal bodies comprehensively dealt with the simultaneous application of HR and HL in armed conflicts, the applicability of HR is still contested by some governments and scholars. Furthermore, the precise relationship between the two legal regimes is far from clear.¹¹ Despite a general tendency to recognise a simultaneous application of HL and HR in times of war and to assess HL as *lex specialis* in relation to HR, there is no common understanding of how a

⁴ See e.g. Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 *Isr YB Hum Rts* 1; Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 *AJIL* 239, 241 et seqq; Hans-Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law* (2004) 86 *RICR* 789; Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws* (1982) *AmULRev* 935; Provost, *International Human Rights and Humanitarian Law*, above n 2; Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 *AJIL* 1; for further reference see also Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 *AJIL* 119, 119, n 7.

⁵ Provost, *International Human Rights and Humanitarian Law*, above n 2, 5.

⁶ Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons, London, 1950) 35-37.

⁷ Universal Declaration of Human Rights (Adopted on 10 December 1948) Available on <<http://www.un.org/Overview/rights.html>>.

⁸ See e.g. provisions prohibiting discrimination, torture, cruel, unusual and degrading treatment or punishment, arbitrary arrest or detention; Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 *AJIL* 239, 245; Provost, *International Human Rights and Humanitarian Law*, above n 2, 6.

⁹ See e.g. art 75 of Protocol I resembling art 14 of the International Covenant on Civil and Political Rights (ICCPR).

¹⁰ Res. XXIII, adopted by the International Conference on Human Rights, Tehran, 12 May 1968; UN GA Res. 2444 (XXIII), 19 December 1968.

¹¹ See Jakob Kellenberger, *Official Statement of ICRC: Protection Through Complementarity of the Law* (6 September 2003) Available on <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList575/D75203C5C3CFB78CC1256DA300427813>>. Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 *AJIL* 1, 30.

simultaneous application of both legal regimes should operate *in concreto* and to what extent both bodies of law can actually benefit from each other. Whereas some authors see great potential for recourse to HR provisions, others doubt that the general provisions of HR treaties could be invoked to trump the more detailed and specific obligations of HL.

This paper will address these uncertainties. To begin with, part II will introduce the differences and similarities of both legal regimes. Then, part III will explain how HR and HL interact in international and non-international armed conflicts and how they relate to one another. Finally, part IV will analyse how HR and HL can be applied in a mutually supportive manner.

II DIFFERENCES AND SIMILARITIES BETWEEN HR AND HL

Although HR and HL aim for the protection of human life and dignity,¹² they comprise some differences with respect to the principles and systematics by which they try to achieve their common purpose.

Whereas HR uses limitation clauses like “prescribed by law”¹³ or “necessary in a democratic society”¹⁴ as a key concept, HL requires the balancing of humanity with “military necessity”.¹⁵ This differentiation is reflected in the respective application of the proportionality principle, which becomes particularly obvious with regard to the use of force.¹⁶ In a HR context, the use of force has to be strictly proportionate to the aim to be achieved.¹⁷

Under HL the use of force against valid targets like combatants and civilians that directly participate in hostilities is not directly governed by proportionality.¹⁸ Typical are prohibitions such as not to cause “*superfluous injury or unnecessary suffering*”¹⁹ or

¹² See IACHR, *Abella v Argentina*, OEA/Ser.L/V/II.98. (13 April 1998), para 158.

Available on <<http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm>>.

¹³ See e.g. arts 18(3), 22(2) ICCPR and arts 5(1), 9(2), 10(2), 11(2) ECHR.

¹⁴ See e.g. arts 21, 22(2) ICCPR, arts 8(2), 9(2), 10(2), 11(2) ECHR, art 2(3) of Protocol 4 ECHR.

¹⁵ Provost, *International Human Rights and Humanitarian Law*, above n 2, 5; Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 9. Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 243. The tension between humanitarian concerns and military necessity is typified in the preamble of the 1907 Hague Regulations. The preamble states that the Regulations have been “inspired by the desire to *diminish the evils of war, as far as military requirements permit.*” Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. (The Hague, 18 October 1907), preamble para 5. (Emphasis added). Available on <<http://www.icrc.org/ihl.nsf/0/1d1726425f6955aec125641e0038bfd6?OpenDocument>>.

¹⁶ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 32.

¹⁷ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 32.

¹⁸ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 33. Provost, *International Human Rights and Humanitarian Law*, above n 2, 8.

¹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) (Adopted on 8 June 1977, entry into force 7 December 1979), art 35(2). (Emphasis added).

not to cause “incidental loss of life, injury to civilians and damage to civilian objects ... , which would be *excessive* in relation to the concrete military advantage anticipated.”²⁰

Secondly, HL treaties depend to some extent upon reciprocity for their application.²¹ In cases where the only adversary to a conflict is not a party to a HL treaty, a state party is generally not obliged to observe the provisions of that treaty.²² Exceptions only apply where the adversary has otherwise accepted the treaty’s obligations²³ or provisions of the treaty can be regarded as declaratory of customary international law and, thus, apply to all states.²⁴ By contrast, once a state has become member to a HR treaty, it is bound to observe its obligations irrespective of whether other states are party to the treaty or not.²⁵ However, this difference should not be overstated, as a state cannot invoke reciprocity to derogate from HL provisions solely because an adversary has violated those same provisions.²⁶

A further difference between HL and HR that is often pointed out rests on the fact that HR is centred on the granting of rights to nationals against their states, while HL is focused on the direct imposition of obligations on the individual.²⁷ This categorical differentiation is, however, somewhat formal and disguises that HL provisions sometimes might imply individual rights as well. For example, art 13 of the Third Geneva Convention (III GC)²⁸ provides for humane treatment of prisoners of war and particularly prohibits “any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody.” When read together with arts 6(1) and 7 III GC that explicitly refer to “rights” conferred upon prisoners of war, this prohibition also suggests a right for prisoners not to be subject to inhumane treatment.²⁹ Furthermore, the Geneva Conventions and other HL treaties comprise provisions which are expressly formulated as individual rights.³⁰ For example, art 27(1) of the Fourth Geneva Convention (IV GC)³¹ provides that “protected persons are entitled ... to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.” Article 75 of

Available on < <http://www.unhchr.ch/html/menu3/b/93.htm>>.

²⁰ *Ibid* art 51(4), (5)(b). (Emphasis added).

²¹ Theodor Meron, *Human rights in internal strife: their international protection* (Grotius Publications, Cambridge, 1987) 11. Christopher Greenwood, “Rights at the Frontier - Protecting the Individual in Time of War” in Barry Rider (ed), *Law at the Centre -The Institute of Advanced Legal Studies at Fifty* (Kluwer Law International, London, Cambridge, MA, 1999) 284.

²² Common art 2(1) Geneva Conventions states 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.*” (Emphasis added) As the Conventions enjoy almost universal acceptance (190 member states) this restriction is rather relevant for the application of Additional Protocol I that refers to common art 2 in art 1(3) Protocol I.

²³ Common art 2(3) Geneva Conventions.

²⁴ See Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 284.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ See e.g., Provost, *International Human Rights and Humanitarian Law*, above n 2, 13.

²⁸ *Geneva Convention relative to the Treatment of Prisoners of War* (Adopted on 12 August 1949, entry into force 21 October 1950) Available on < <http://www.unhchr.ch/html/menu3/b/91.htm>>.

²⁹ Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 282.

³⁰ *Ibid.*

³¹ *IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Adopted on 12 August 1949, entry into force 21 October 1950)

Available on < <http://www.unhchr.ch/html/menu3/b/92.htm>>.

Additional Protocol I to the Geneva Conventions (Additional Protocol I) further lists a series of fundamental guarantees for persons in the power of a belligerent.³²

The similarities between the legal regimes become even more obvious when taking a look at the substantive content of both legal regimes. HL and HR exhibit a large measure of parallelism between norms.³³ Examples of parallel provisions include the right to life; the prohibition of torture and cruel, inhumane, or degrading treatment or punishment; arbitrary arrest or detention; discrimination on grounds of race, sex, language, or religion; and due process of law.³⁴

Finally - as part III will demonstrate - the strict separation into HL as the law of war and HR as the law of peace can hardly be upheld any longer.

III APPLICABILITY OF HR IN ARMED CONFLICT AND RELATIONSHIP TO HL

Generally, HL and HR may interact in two situations. First, HR may apply in an international armed conflict that traditionally was eligible only for HL. Second, HL may apply in a non-international armed conflict; thus in a domestic law enforcement context that historically was the exclusive domain of HR.³⁵

A Applicability in International Armed Conflicts

To interact with HL in an international armed conflict, HR must continue to apply even after the outbreak of war and - as forces in an international conflict usually operate outside their own territory³⁶ - be applicable extraterritorially. As most HR treaties regulate their application differently, this part will examine the applicability of HR separately with respect to each treaty.

1 European Convention on Human Rights (ECHR)

³² See particularly, the rights to human treatment and non-discrimination in art 75(1). *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (Adopted on 8 June 1977, entry into force 7 December 1979) Available on < <http://www.unhcr.ch/html/menu3/b/93.htm>>.

³³ Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 245, 266.

³⁴ Theodor Meron, *Human Rights in Internal Strife: Their International Protection* (Grotius Publications, Cambridge, 1987), 12-18.

³⁵ For reference, see above n 4.

³⁶ Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws* (1982) Am U L Rev 935, 939.

(a) *Applicability of the ECHR in Armed Conflicts*

Article 15(1) of the European Convention on Human Rights (ECHR)³⁷ may give a certain hint as to the general applicability of the Convention in armed conflicts.³⁸ It provides that “[i]n times of war or other public emergency threatening the life of the nation any contracting party *may* take measures derogating from its obligations under [the] Convention.”³⁹

As the International Law Commission (ILC) has remarked, this “competence to derogate ... certainly provides evidence that an armed conflict as such does not result in suspension or termination [of the Convention’s rights].”⁴⁰ The fact that art 15(1) ECHR provides that a state *may* derogate from its obligation under the Convention in times of war, rather than that such provisions are automatically rendered inapplicable, is incompatible with the notion that the Covenant is applicable only in time of peace.⁴¹

Of course, as Frowein admits, it is not absolutely clear whether art 15(1) ECHR actually refers to the application of the convention between a state party and the nationals of other belligerent parties to an armed conflict, or merely to emergency measures taken by a state with regard to its own nationals.⁴² However, art 15(2) ECHR more significantly indicates that the application of the Convention is not restricted to the relationship between a state and its citizens but generally affects the protection of all individuals during wartime.⁴³ It stipulates that a state is not permitted, even in times of war, to derogate from the right to life as protected under “art 2, except in respect of deaths resulting from lawful acts of war, or from arts 3, 4(1) and 7 [of the Convention].”⁴⁴

However, as the European Court of Human Rights (ECtHR) has observed, art 15 ECHR does not provide sufficient evidence that the Convention applies extraterritorially since art 15 ECHR “is to be read subject to the ‘jurisdiction’ limitation enumerated in art 1 ECHR.”⁴⁵

(b) *Extraterritorial Applicability of the ECHR*

³⁷ *European Convention on Human Rights* (Adopted in Rome on 4 November 1950). Available on <http://www.hrcr.org/docs/Eur_Convention/euroconv8.html>.

³⁸ Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 Isr YB Hum Rts 1, 2.

³⁹ Emphasis added.

⁴⁰ International Law Commission (57th session), *First report on the effects of armed conflicts on treaties* (by Mr. Ian Brownlie, Special Rapporteur) A/CN.4/552, Geneva (2 May-3 June and 4 July-5 August 2005) at 29, para 87.

⁴¹ Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 279.

⁴² Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 Isr YB Hum Rts 1, 3.

⁴³ *Ibid*; Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 279.

⁴⁴ *Ibid*.

⁴⁵ *Banković v Belgium and Others*, Appl. No. 52207/99, (12 December 2001) 123 ILR 94, 110, para 62. The case is discussed further below.

Art 1 ECHR states that “[t]he high contracting parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in this Convention.”⁴⁶

In *Cyprus v Turkey*⁴⁷ the European Commission of Human Rights (EComHR) dealt with the occupation of Northern Cyprus by Turkish forces in the aftermath of a large-scale military intervention in July 1974.⁴⁸ The EComHR held that the term “within their jurisdiction” would not be “equivalent to or limited to ‘within the national territory’ of the [member state] concerned”.⁴⁹ It would emerge⁵⁰

from the language, ... and the objective of [art 1 ECHR] and from the purpose of the Convention as a whole that the high contracting parties are bound to secure the rights and freedoms to all persons under their actual authority and responsibility, not only when that authority is exercised within the territory [of the parties] but also when it is exercised *abroad*.

This interpretation by the Commission has been confirmed by the European Court of Human Rights (ECtHR) which stated in *Loizidou v Turkey* that:⁵¹

Bearing in mind the object and purpose of the Convention, the responsibility of a contracting party may also arise when, as a consequence of military action - whether lawful or unlawful - it exercises *effective control* of an area *outside its national territory*.

On the merits the court found that it was “obvious from the large number of troops engaged in active duties in Northern Cyprus that Turkey’s army exercised effective overall control over that part of the Island” and consequently could be held responsible even for policies and actions of the Turkish Republic of Northern Cyprus.⁵² The ECtHR concluded that “those affected by such policies and actions” would “therefore come within the ‘jurisdiction’ of Turkey for the purposes of art 1 ECHR.”⁵³

⁴⁶ Emphasis added.

⁴⁷ *Cyprus v Turkey* (Appl. No. 8007/77) (Decision on the Admissibility of the Application) (10 July 1978) 62 ILR 4.

⁴⁸ Following a military coup in Cyprus against the government of Archbishop Makarios, led by Greek nationalist Cypriots and backed by the then military regime in Greece, Turkish armed forces, on 20 July 1974, landed on Cyprus and occupied the northern part of the island. A Turkish Federal State of Cyprus (TFSC) was set up in the occupied area in 1975. The government of the Republic of Cyprus and the vast majority of states did not recognise the TFSC. After Turkish forces remained on the island, the Government of Cyprus, in 1977, lodged the application with the EComHR, alleging HR violations by Turkey in the Turkish occupied areas; see *Cyprus v Turkey* (Appl. No. 8007/77) (Decision on the Admissibility of the Application) (10 July 1978) 62 ILR 4, 5. In 1983, the Turkish Republic of Northern Cyprus (TRNC) was proclaimed as the successor of the TFSC. Turkey is the only state that recognises the TRNC. Other states and the United Nations acknowledge the sovereignty of the Republic of Cyprus over the whole island. To date, Turkey has still over 30,000 troops in Northern Cyprus; see Wikipedia, *The Free Encyclopaedia*. Available on <http://en.wikipedia.org/wiki/Turkish_Republic_of_Northern_Cyprus>.

⁴⁹ *Cyprus v Turkey* (Appl. No. 8007/77) (Decision on the Admissibility of the Application) (10 July 1978) 62 ILR 4, 74, para 19.

⁵⁰ *Ibid.* (Emphasis added).

⁵¹ The Court continued that “the obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”; *Loizidou v Turkey* (Preliminary Objections) (23 February 1995) 103 ILR 622, 642, para 62. (Emphasis added). Recalled by the Court in *Loizidou v Turkey* (Merits) (18 December 1996) 108 ILR 443, 465, para 52.

⁵² *Loizidou v Turkey* (Merits) (18 December 1996) 108 ILR 443, 466, para 56.

⁵³ *Ibid.*

In *Banković v Belgium and Others*⁵⁴ the Court addressed the bombing of the Radio-Television Serbia (RTS) headquarters in Belgrade by seventeen member states of the North Atlantic Treaty Organisation (NATO) which were also parties to the ECHR. The bombing responded to attacks by the Government of the Federal Republic of Yugoslavia (FRY)⁵⁵ on the population of Kosovo.⁵⁶ During the attacks on the RTS building sixteen people were killed and another sixteen were injured.⁵⁷ Relatives of those killed and one of the injured survivors brought proceedings before the ECtHR and maintained that the seventeen NATO members violated arts 2 (right to life), 10 (freedom of expression) and 13 (right to an effective remedy) of the Convention.⁵⁸

Considering the application of the ECHR, the Court approved its *Loizidou* jurisprudence⁵⁹ but also emphasised that it would follow from the ordinary meaning of the term “jurisdiction” in public international law⁶⁰ and from the preparatory works⁶¹ that “art 1 [ECHR] had to be considered to reflect primarily a territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case”.⁶² The Court concluded that such exceptions would comprise in particular situations in which⁶³

[a] state, through the *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 power normally to be exercised by that Government.

Against this backdrop the Court denied the exercise of extraterritorial jurisdiction by the NATO members as the bombardment of the RTS - unlike an occupation - could not be considered as “effective control” over the concerned territory.⁶⁴

Hence, in *Banković v Belgium and Others*, ECtHR adhered to its reasoning that the exercise of “effective control” provides for the extraterritorial application of the Convention’s rights. In the following it remains to be discussed whether this reasoning is also true for territories of states that are not party to the Convention.

(c) *Obligation to ensure the Rights of the ECHR in Territories of States that are not Party to the Convention*

⁵⁴ *Banković v Belgium and Others*, Appl. No. 52207/99, (12 December 2001) 123 ILR 94, 112.

⁵⁵ The FRY is not a party to the ECHR.

⁵⁶ *Banković v Belgium and Others*, Appl. No. 52207/99, (12 December 2001) 123 ILR 94, 95.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Banković v Belgium and Others*, Appl. No. 52207/99, (12 December 2001) 123 ILR 94, 112, para 70.

⁶⁰ *Ibid* 109, paras 59-61.

⁶¹ *Ibid* 110-111, paras 63-65.

⁶² *Ibid* 109, para 61.

⁶³ *Ibid* 113, para 71 (Emphasis added).

⁶⁴ *Ibid* 114, para 75. The Court argued that otherwise “anyone adversely affected by an act imputable to a contracting state, wherever in the world that act may have been committed” would be “thereby brought within the jurisdiction of that state”. According to the court such an approach would be contrary to the text of art 1 ECHR, *Ibid.*

In *Banković v Belgium and Others* the ECtHR pointed out that “[t]he [ECHR] was not designed to be applied throughout the world, even in respect of conduct of contracting states” and that⁶⁵

the desirability of avoiding a gap or vacuum in [HR’s] protection has so far been relied on by the Court in favour of establishing jurisdiction⁶⁶ only when the territory in question was one that ... would *normally* be covered by the Convention.

The Court concluded that “[t]he FRY clearly does not fall within this legal space.”⁶⁷

As the FRY is not party to the ECHR some authors interpret this finding as to generally exclude the responsibility of states with respect to conduct in territories of non-party states.⁶⁸ On the other hand, Schilling doubts that this reasoning has to be coercively interpreted as to restrict the extraterritorial applicability of the ECHR to those cases in which a state party exercises effective control within the territorial scope of the Convention.⁶⁹ The Court dismissed the application essentially due to a lack of effective control constituted by the bombing and, conversely, never expressly held that the exercise of effective control constitutes extraterritorial jurisdiction over a territory only when that territory forms part of another member state to the ECHR.⁷⁰

Admittedly, it may be alleged that the wording of the Court’s finding in the cited passage in *Banković v Belgium and Others* is relatively clear and that it barely accommodates the interpretation suggested by Schilling. However, a restriction of the obligation of member states to ensure the Convention’s rights to territories of other members would imply that states parties are free to violate their obligations as long as they exercise armed attacks on the population in territories of states that are not party to the Convention. Such an interpretation is hardly compatible with the aim of the Convention to secure the “universal and effective recognition and observance of the Rights [of the ECHR]”⁷¹ and the object of the Council of Europe to maintain and further realize Human Rights and Fundamental Freedoms.⁷² Therefore, it is more convincing to argue that member states are obliged to ensure the rights of the ECHR even if they exercise “effective control” in the territory of a state that is not party to the Convention.

2 *International Covenant on Civil and Political Rights (ICCPR)*

⁶⁵ *Ibid* 116, para 80 (Emphasis added).

⁶⁶ See in particular, *Cyprus v Turkey*, (Appl. No. 25781/94) (10 May 2001) 120 ILR 10, 39, para 78.

⁶⁷ *Banković v Belgium and Others* (Appl. No. 52207/99) (12 December 2001) 123 ILR 94, 116, para 80.

⁶⁸ See e.g. Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 26.

⁶⁹ Theodor Schilling, *Is the United States bound by the ICCPR in Relation to Occupied Territories?*, at 8. Available on

<http://www.jeanmonnetprogram.org/fellowsforum/Schilling%20Forum%20Paper%20100504.pdf>.

⁷⁰ *Ibid*.

⁷¹ ECHR, preamble, para 2.

⁷² *Ibid* para 3.

(a) *Applicability of the ICCPR in Armed Conflicts*

Like the ECHR the International Covenant on Civil and Political Rights (ICCPR)⁷³ contains a derogation provision that implies that the rights of the Covenant do not automatically cease in times of armed conflict.⁷⁴ Article 4 ICCPR provides that states parties “*may take measures derogating from their obligations under [the] Covenant ... in time of public emergency which threatens the life of the nation*”⁷⁵ and prohibits any derogation with respect to certain provision.⁷⁶ The extraterritorial applicability of the ICCPR is less clear.

(b) *Extraterritorial Applicability of the ICCPR*

In contrast to art 1 ECHR, the wording of the application clause of the ICCPR explicitly refers to the territory of the member states. Article 2(1) of the ICCPR provides that “[e]ach state party to the present Covenant undertakes to respect and ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognised in the present Covenant”⁷⁷

Some authors advocate that the ordinary meaning of the wording of the article would clearly suggest that a state party has to ensure the rights of the Covenant only to individuals who are both *within* its territory *and* subject to its sovereign authority.⁷⁸ Accordingly, a state cannot be held responsible for acts of its armed forces executed outside its territory. Dennis argues that this literal reading finds further support in the drafting process of the Covenant.⁷⁹ During this process the US explicitly proposed the addition “within its territory” to the draft text of art 2(1) ICCPR⁸⁰ as they were “afraid that without the addition the draft Covenant might be construed as obliging the contracting state ... to enact legislation concerning persons, who although outside its

⁷³ *International Covenant on Civil and Political Rights* (Adopted on 16 December 1966, entry into force 23 March 1976) Available on <http://www.unhcr.ch/html/menu3/b/a_ccpr.htm>.

⁷⁴ See above part III A 1 (a) and ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) 43 ILM 1009 [Hereinafter *Wall* Advisory Opinion], para 106, citing ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996) 1996 ICJ Rep. [Hereinafter *Nuclear Weapons* Advisory Opinion] 226, para 25. Paragraph 25 states that “the protection of the [ICCPR] does not cease in times of war, except by operation of art 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”

⁷⁵ ICCPR, art 4(1). (Emphasis added).

⁷⁶ ICCPR, art 4(2). In particular with regard to the right to life in art 6 ICCPR.

⁷⁷ Emphasis added.

⁷⁸ Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 AJIL 119, 122; Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws* (1982) AmULRev 935, 939.

⁷⁹ Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 AJIL 119, 122; The preparatory work is part of the material to which, according to art 32 of the Vienna Convention on the Law of Treaties, recourse may be had to as a supplementary means of interpretation.

⁸⁰ UN Doc. E/CN.4/365 (1950) (U.S. proposal), at 14.

territory were technically within its jurisdiction for certain purposes.”⁸¹ Finally, the US representatives asserted the adoption of the amendment⁸² and defended it successfully against French proposals to subsequently delete the phrase “within its territory”.⁸³

In the aftermath of the Covenant’s adoption several member states denied the applicability of the ICCPR in international armed conflicts on different occasions. They partly referred to the wording of art 2 ICCPR, but mainly argued that the Covenant was intended only to protect citizens against infringements by their own government in times of peace. Israel took this view with regard to the Palestinian occupied territories,⁸⁴ the US with respect to the detainees in Guantanamo⁸⁵ and the Netherlands with reference to the conduct of Dutch blue helmets in Srebrenica.⁸⁶ In the *Nuclear Weapons Advisory Opinion* some states endorsed the same rationale.⁸⁷

Furthermore, some authors point out that - although there have been a number of extraterritorial military missions involving contracting states⁸⁸ - no state has made a derogation from its obligations pursuant to art 4(3) ICCPR to indicate a belief that its actions abroad involved an exercise of jurisdiction under the Covenant.⁸⁹

Despite these objections, the Human Rights Committee (HRC) has progressively departed from a narrow literal interpretation of art 2 ICCPR. In *López Burgos v Uruguay* and *Celiberti v Uruguay* the HRC found that a state could be held responsible for violations of its ICCPR obligations *towards its own nationals* even if those violations were conducted in the territory of another state.⁹⁰ In an individual opinion Committee member Christian Tomuschat emphasised that the HRC had elaborated the extraterritorial applicability of the Covenant with regard to specific circumstances, namely the kidnapping of Uruguayan citizens by their own state’s agents into Uruguayan territory in times of peace. Tomuschat endorsed that “[t]he formula [within

⁸¹ They referred in particular to persons within the occupied territories of Germany, Austria and Japan; UN Doc. E/CN.4/SR.138 (1950) at 10.

⁸² UN Doc. E/CN.4/SR.194 (1950) at 11.

⁸³ UN Doc. E/CN.4/L.161 (1952) (French Amendment) and UN Doc. E/CN.4/SR.329 (1952) at 14 (vote of the Commission rejecting the amendment); UN Doc. A/C.3/SR.1259 (1963) at para 30 (rejection of the French proposal by the General Assembly).

⁸⁴ *Wall Advisory Opinion*, above n 75, para 102, quoting the Report of the Secretary-General prepared pursuant to GA Res. ES-10/13 A/ES-10/248, Annex I, para 4.

⁸⁵ See Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 AJIL 119, 136.

⁸⁶ Replies of the Government of the Netherlands to the Concerns Expressed by the Human Rights Committee, UN Doc. CCPR/CO/72/NET/Add.1 (2003) para 19.

⁸⁷ See *Nuclear Weapons Advisory Opinion*, above n 75, para 24.

⁸⁸ *Inter alia*, in Iraq, Bosnia and Herzegovina and in the FRY.

⁸⁹ Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 AJIL 119, 125. The existing derogations under art 4 ICCPR have been lodged in respect of internal conflicts only; see *Ibid.* Different from Dennis, the ECtHR merely referred to this state practice to underline that the derogation provision of art 15 ECHR does not in itself suggest that the Convention applies extraterritorially and argued that art 15 ECHR had to be read subject to art 1 ECHR. However, the Court did not consider that state practice to overrule the obligation of states parties in art 1 ECHR to ensure the rights of the Convention “to everyone within their jurisdiction”; see *Banković v Belgium and Others*, Appl. No. 52207/99, (12 December 2001) 123 ILR 94, 110, para 62.

⁹⁰ *López Burgos v Uruguay*, Comm. No. 56/1979, 10.3; *Celiberti de Casariego v Uruguay*, Comm. No. 56/1979.

its territory...] was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations” and referred in particular to “instances of occupation of foreign territory” as “another example of situations which the drafters of the Covenant had in mind when they confined the obligations of states parties to their own territory.”⁹¹ However, he agreed with the Committee that art 2(1) ICCPR had to be interpreted in such a way that states could not escape their obligations under the Covenant and that states, therefore, should be held accountable for violations of the ICCPR in respect of their own nationals even if they live abroad.⁹²

Observing Israel’s reports under the Covenant as regards the occupation of the Palestinian territories, the HRC further developed its jurisprudence. In 2003 the HRC found that⁹³

in the *current circumstances*, the provisions of the Covenant apply to the benefit of the population of the occupied territories, for all conduct by the state party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant⁹⁴

The HRC was well aware that the “current circumstances” included “the long-standing presence of Israel in the occupied territories, Israel’s ambiguous attitude towards their future status, as well as the *exercise of effective jurisdiction* by Israeli forces therein.”⁹⁵ Thus, the HRC based its reasoning on the specific situation of the long-term occupation and the “quasi-territorial” jurisdiction that Israel exercised in the occupied territories.

Only recently the HRC completely abandoned the literal reading of art 2(1) ICCPR. In its General Comment No. 31 it held that art 2(1) ICCPR requires states parties⁹⁶

to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. [T]he enjoyment of Covenant rights is not limited to citizens of states parties but must also be available to all individuals, regardless of nationality or statelessness, who may find themselves in the territory *or* subject to the jurisdiction of the state party. This principle also applies to those *within the power or effective control* of the forces of a state party acting outside its territory, regardless of the circumstances in which such *power or effective control* was obtained, such as forces constituting a national contingent of a state party assigned to an international peace-keeping or peace-enforcement operation.

The International Court of Justice (ICJ) has taken a similar approach. When the ICJ interpreted art 2(1) ICCPR in its *Wall* Advisory Opinion it found that reference to the *object and purpose* of the ICCPR implied that states parties to the Covenant should be

⁹¹ *Celiberti de Casariego v Uruguay*, Comm. No. 56/1979, views of 29 July 1981, individual opinion of Tomuschat.

⁹² *Celiberti de Casariego v Uruguay*, Comm. No. 56/1979, views of 29 July 1981, individual opinion of Tomuschat (Emphasis added).

⁹³ Concluding Observations of the HRC: Israel. 21/08/2003. CCPR/CO/78/ISR, para 11.

⁹⁴ Concluding Observations of the HRC: Israel. 21/08/2003. CCPR/CO/78/ISR, para 11.

⁹⁵ Concluding Observations of the HRC: Israel. 18/08/1998. CCPR/C/79/Add.93, para 10 (Emphasis added). In subsequent cases the HRC did not refer to “effective jurisdiction” any more and replaced the term, similar to the EComHR and the ECtHR by the notion of “effective control” as to clarify that it does not matter if control over a territory is exercised legally or not.; *see e.g.* General Comment 31, below.

⁹⁶ HRC, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev 1/Add.13 (adopted on 29 March 2004), para 10 (Emphasis added). Available on <<http://www1.umn.edu/humanrts/gencomm/hrcom31.html>> (Emphasis added).

bound to comply with its provisions even if they are exercising jurisdiction outside their national territory.⁹⁷

The majority of authors and scholars similarly argue that the ICCPR should be construed as applying extraterritorially whenever a state is exercising public power outside its territorial sovereignty, as every other interpretation would allow states to escape from their obligations under the Covenant and, therefore, would be contrary to the object and purpose of HR treaties to universally grant protection to all individuals.⁹⁸

Dennis, however, doubts that the ICJ's finding in the *Wall* Advisory Opinion could be interpreted as to endorse the view that the rights of the Covenant would generally apply extraterritorially during situations of armed conflict, as the court did not explicitly cite General Comment No. 31 but rather referred to the HRC's concluding observations concerning the special circumstances of Israel's long-term occupation.⁹⁹

It is arguable whether a teleological interpretation can be regarded as overriding the relatively clear wording of art 2(1) ICCPR.¹⁰⁰ At first sight, art 31(1) of the Vienna Convention on the Law of Treaties (VCLT)¹⁰¹ does not seem to provide a clear preference as to the means of interpretation. It states that¹⁰²

a treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and *in the light of its object and purpose*.

It could be advocated that the “ordinary meaning” to be given to the wording ultimately limits the extent to which a provision can be construed. Accordingly, the formulation “within its territory *and* subject to its jurisdiction” in art 2(1) ICCPR could hardly be interpreted as obliging states parties to ensure the rights of the Covenant to all individuals “within its territory *or* subject to its jurisdiction”.

On the other hand, the formulation of art 31(1) VCLT saying that “a treaty shall be interpreted ... in the light of its object and purpose” rather suggests a dynamic interpretation which can also depart from the literal meaning of a treaty's wording.

Correspondingly, the HRC embraced a dynamic interpretation of the Covenant. In *Judge v Canada*¹⁰³ it stated that the ICCPR “should be interpreted as a living instrument and the rights protected under it should be applied in the context and in the light of

⁹⁷ *Wall* Advisory Opinion, above n 75, para 109 (Emphasis added).

⁹⁸ See e.g. Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 *Isr YB Hum Rts* 1, 6; Theodor Meron, *Extraterritorially of Human Rights Treaties* (1995) 89 *AJIL* 78, 78-79; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (N.P. Engel Kehl [Germany]; Arlington, Va., U.S.A; 1993), 42, para 28.

⁹⁹ Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 *AJIL* 119, 122.

¹⁰⁰ Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press, Oxford, 2003) 110.

¹⁰¹ *Vienna Convention on the Law of Treaties* (Available on < <http://www.un.org/law/ilc/texts/treaties.htm>>.

¹⁰² Emphasis added.

¹⁰³ *Rodger Judge v Canada* (Comm. No. 829/1998) (20 October 2003), para 10.3.

present-day conditions.”¹⁰⁴ This reasoning is particularly true for the interpretation of art 2(1) ICCPR. A territorial restriction of the Covenant is at odds with the idea of a universal enforcement of HR, as expressed in the preamble of the Covenant.¹⁰⁵ Therefore, states should be responsible for their conduct even if they exercise “effective control” outside their territory.

3 *International Covenant on Economic, Social and Cultural Rights*

Unlike the ECHR and the ICCPR the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰⁶ contains no provision on its scope of application.

According to Dennis the lack of an explicit application provision suggests that the ICESCR does not apply extraterritorially.¹⁰⁷ He refers particularly to art 29 VCLT.¹⁰⁸ Article 29 states that “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its *entire* territory”.¹⁰⁹ Thus, art 29 VCLT stresses that a state, in the absence of specific regulations, cannot argue that the application of a treaty is excluded with respect to particular parts of its territory. This does, however, not suggest that the application of the treaty should be generally restricted to the territory of a state.

Dennis further claims that the negotiating history of the ICESCR implies that states parties wanted to restrict the application of the Covenant to their territory.¹¹⁰ However, the negotiation record solely indicates that the contracting states, in 1966, omitted an explicit territorial application clause so as to avoid a cementation of territorial claims with respect to colonies. On the other hand, the contracting states naturally assumed that

¹⁰⁴ On the other hand, the ECtHR denied that the “notion of the [ECHR] being a living instrument to be interpreted in light of present-day conditions” may lead to an extension of the “the scope and reach of the entire Convention” beyond the ordinary meaning of art 1 ECHR; *Banković v Belgium and Others*, 123 ILR 94, 110-111, paras 64-65. The Court found it also “difficult to suggest that exceptional recognition by the [HRC] of certain instances of extra-territorial jurisdiction ... displaces in any way the territorial jurisdiction expressly conferred by [art 2(1) ICCPR]”; *Ibid* 115, para 78. Similarly, some authors doubt the authority of the HRC to generously construe art 2(1) ICCPR; Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 AJIL 119, 127; Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press, Oxford, 2003) 110. Finally, it has to be remembered that neither the ICJ’s Advisory Opinions nor the HRC’s General comments and views under the First Optional Protocol to the ICCPR are considered to be legally binding.

¹⁰⁵ ICCPR, preamble, para 3, providing that “everyone may enjoy his civil and political rights” and para 4, obliging states “to promote universal respect for, and observance of, human rights and freedoms”. See also David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defense?* (2005) 16 EJIL 171, 184-185; Schilling, *Is the United States bound by the ICCPR in Relation to Occupied Territories?*, above n 68, 6.

¹⁰⁶ *International Covenant on Economic, Social and Cultural Rights* (Adopted 16 December 1966, entry into force 3 January 1976) Available on < http://www.unhchr.ch/html/menu3/b/a_ceschr.htm>.

¹⁰⁷ Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 AJIL 119, 127-128, 140.

¹⁰⁸ *Ibid* 127.

¹⁰⁹ Emphasis added.

¹¹⁰ Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 AJIL 119, 127, 128.

the Covenant applied to dependant territories abroad over which states parties exercised jurisdiction.¹¹¹

Although the ICJ conceded that the “[ICESCR] guarantees rights which are essentially territorial”,¹¹² it found in its *Wall* Advisory Opinion that “it is not to be excluded that [the Covenant] applies both to territories over which a state party has sovereignty and to those over which that state exercises territorial jurisdiction.”¹¹³ For example, art 14 ICESCR which provides a right to education refers to the metropolitan territory of a party as well as to other territories under the party’s jurisdiction.¹¹⁴ The Court further rejected Israel’s objection that the ICESCR neither applied during an armed conflict nor outside a state’s territory. It pointed out that a “state party’s obligations under the Covenant apply to all territories and populations under its *effective control*.”¹¹⁵

However, the Court explicitly referred to the “37 years ... [of Israel’s] territorial jurisdiction as the occupying Power”.¹¹⁶ Therefore, it is reasonable to assume that the principle of “effective control” should only be carefully applied to other situations of armed conflict. A cautious application of the ICESCR is necessary as the Covenant may oblige states to ensure rights which do not accommodate belligerent situations that are different from long-term occupations. For example, a state can hardly be expected to ensure fair working conditions (art 7 ICESCR), the right to form and join a trade union (art 8 ICESCR) or the right to an adequate standard of living (art 11 ICESCR) to enemy nationals in situations where its agents exercise only a low degree of “effective control” over an enemy territory.

Furthermore, art 4 ICESCR permits states to derogate from their obligations under the Covenant “solely for the purpose of promoting the general welfare in a democratic society.” It is hard to envisage a belligerent situation where a state could fulfil these requirements.¹¹⁷ To avoid a situation where a state is obliged to ensure HR which it cannot reasonably be expected to guarantee, the application of the ICESCR should be subject to a test based on the exercise of a high degree of “effective control”. The replacement of a territory’s ordinary system of public order by the occupying state’s governmental structure, similar to the situation during a long-term occupation, is a strong indication for such a high degree of “effective control”.¹¹⁸

4 *Convention on the Rights of the Child*

¹¹¹ UN Doc. A/C.3/SR.1411 (1966) paras 4, 36, 38. (1966)

¹¹² *Wall* Advisory Opinion, above n 75, para 112.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* quoting the 2001 dialogue between the Committee on Economic, Social and Cultural Rights and Israel on Israel’s 1998 report under the ICESCR E/C.12/1/Add.90, paras 15 and 31.

¹¹⁶ *Wall* Advisory Opinion, above n 75, para 112.

¹¹⁷ See also, Judge Higgins, *Wall* Advisory Opinion, Separate Opinion of Judge Higgins, para 27. Available on <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>.

¹¹⁸ See conclusion below for more detailed description of the flexible application of the “effective control” principle.

Article 2 of the Convention on the Rights of the Child (CRC) provides that “states parties shall respect and ensure the rights set forth in the present Convention to each child *within their jurisdiction*.”¹¹⁹ In its *Wall* Advisory Opinion the ICJ concluded - without any further analyses of the provision - that the “Convention is therefore applicable within the occupied Palestinian Territory.”¹²⁰

Dennis doubts the universal applicability of the CRC during wartime.¹²¹ He advocates that art 38 CRC rather indicates that the provisions of the Convention generally do not apply outside the territory of a state during periods of armed conflict and military occupation.¹²² The provision reconfirms in para 1 that the “states parties undertake to respect and to ensure respect for rules of [HL] applicable to them in armed conflicts which are relevant to the child” and further refers to certain specific HL obligations in paras (2) - (4). Dennis argues that this reference would not be necessary if all other articles of the CRC applied in times of war anyway.¹²³

However, the aim of the reference is to enhance the protection of the child in times of armed conflict.¹²⁴ As the Convention does not add anything to the level of protection that already exists under substantive HL provisions, the main contribution of the reference can only be to subordinate HL provisions to the monitoring of the CRC treaty body¹²⁵ in order ensure that these provisions are also applied by CRC member states that are not party to the relevant HL conventions.¹²⁶ Therefore, the Convention must generally apply in situations of armed conflict.¹²⁷

However, this does not imply that the whole set of CRC provisions remains in force during wartime.¹²⁸ Although the CRC does not include a general derogation provision, several of its rights are subject to restrictions necessary to protect in particular “the national security, public order, public health or morals or the rights and freedoms of others”¹²⁹

¹¹⁹ *Convention on the Rights of the Child* (20 November 1989)

Available on <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>. (Emphasis added).

¹²⁰ *Wall* Advisory Opinion, above n 75, para 113.

¹²¹ Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 AJIL 119, 129.

¹²² *Ibid.*

¹²³ Ilene Cohn, *The Convention on the Rights of the Child: What it Means for Children in War* (1991) 3 IJRL 100, 105.

¹²⁴ For further reference, see Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 Isr YB Hum Rts 1, 7.

¹²⁵ The Committee on the Rights of the Child, established by art 43 CRC.

¹²⁶ This is particularly true for the application of the Additional Protocols to the Geneva Conventions; Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 Isr YB Hum Rts 1, 7.

¹²⁷ Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 Isr YB Hum Rts 1, 7.

¹²⁸ Ilene Cohn, *The Convention on the Rights of the Child: What it Means for Children in War* (1991) 3 IJRL 100, 105.

¹²⁹ See art 10(2) CRC (right to leave any country), art 13(2) CRC (freedom of expression), art 14(2) CRC (freedom to manifest one’s religion or beliefs) and art 15(2) CRC (freedom of association and peaceful assembly).

Generally, HR and HL simultaneously apply in an international armed conflict as HR remains applicable in times of war and also applies in enemies' territory where a state is exercising "effective control".

As the evaluation of "effective control" is often more complex than during the occupation of Northern Cyprus or the Palestinian territories, clearer and more reliable criteria need to be developed.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) elaborated criteria that could also serve as a model for the assessment of "effective control" in a HR context. In *Prosecutor v Rajić* the Tribunal had to answer the "question whether the degree of control exercised by the [Bosnian Croat forces (HVO)] over the village of Stupni Do was sufficient to amount to occupation within the meaning of art 53 IV GC."¹³⁰

The Tribunal found that "the requirement may be interpreted to provide broad coverage" and stated that "[t]here is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation".¹³¹ It considered a territory as occupied when¹³²

- (i) there is a military force whose presence in a territory is not sanctioned
- (ii) the military force has displaced the territory's ordinary system of public order and government, replacing it with its own command structure
- (iii) there is difference of nationality and interest between the inhabitants [of the territory] and the [military] forces
- (iv) there is a practical need for an emergency set of rules to reduce the dangers which can result from clashes between the military forces and the inhabitants

Applying these criteria the Tribunal held that Stupni Do came under the control of the HVO as soon as it was overrun.¹³³

In a HR context, similarly differentiated criteria could provide further guidance as to the applicability of HR provisions. As already stated, the degree of "effective control" may be too low to expect states to enforce rights of the ICSECR. On the other hand, it may be questionable why a lower degree of "effective control" over a territory should not be sufficient to require states to guarantee fundamental HR, such as the right not to be arbitrarily deprived of one's life in art 6(1) ICCPR, even in times of war.

Criteria that provide for an application of HR in a manner proportionate to the level of "effective control" would accommodate more appropriately the conditions of modern warfare.¹³⁴ "Effective control" over a territory cannot only be exercised by military

¹³⁰ *Ibid* 160-161, paras 38 - 43. Art 53 IV GC provides for the protection of property in occupied territories (Section 111).

¹³¹ *Ibid* 161, para 41, referring to and quoting the *Commentary on Geneva Convention IV*, at 60.

¹³² *Ibid* quoting Adam Roberts, *What is a Military Occupation?* (1984) 53 BYIL 249, 274-275.

¹³³ *Ibid* 161, paras 38, 42.

¹³⁴ The applicants in *Banković v Belgium and Other* suggested a similar approach; *Banković v Belgium and Others* (Appl. No. 52207/99) (12 December 2001) 123 ILR 94, 114, para 75. However, the

forces on the ground but also by military forces in the air. Sophisticated air campaigns may break the adversary defence much easier and provide for more control over a territory than ground troops that are involved in house-to-house fighting. In fact, it is doubtful why a state should be free to violate HR in a bombing during an air raid but is considered to be bound if it executes the attack with forces on the ground. It goes without saying that the former attack might imply more devastating consequences than the latter.

This paper advocates to develop “effective control” criteria that take into account the degree to which (a) adversary resistance has been overcome, (b) military forces can execute operations unhampered in a given territory of another state, (c) the ordinary system of public order has been eliminated and (d) military forces are exercising sovereignty over the territory and its airspace. Then HR provisions should be proportionally applied according to those criteria. The *Prosecutor v Rajić* case has proven that such criteria can work in practice. The exercise of “effective control” by states in a HR context does not differ significantly from the exercise of such control by individuals under HL since states, too, can exercise control only through the conduct of their agents.

Admittedly, a proportionate application of HR according to criteria such as those set out above might run the risk of creating legal uncertainty in the short run. However, the jurisprudence of international legal bodies would soon give more specificity to the criteria and clarify which HR provisions apply in a given warfare situation. Conversely, once the criteria are developed they would enhance the authority of international courts and tribunals, as their decisions would be more predictable.

B Applicability in Non-International Armed Conflicts

“In the case of armed conflict not of an international character” common art 3 to the Geneva Conventions provides for the application of certain fundamental HL obligations as a minimum standard.¹³⁵ As demonstrated above, HR does not automatically cease to apply with the outbreak of war.¹³⁶ The preamble of Additional Protocol II to the Geneva Conventions (Additional Protocol II)¹³⁷ provides further evidence that HR should also

ECtHR denied that art 1 ECHR would accommodate such a “cause-and-effect” notion of jurisdiction. It found that “the wording of [art 1] does not provide support for the applicants’ suggestion that the obligation in art 1 to secure ‘the rights and freedoms [of the Convention]’ can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question.”, *Ibid*.

¹³⁵ Article 3 (1) prohibits: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment and (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

¹³⁶ See part III A 1(a) and 2 (a) above.

¹³⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Adopted on 8 June 1977, entry into force 7 December 1978).

Available on <<http://www.unhchr.ch/html/menu3/b/94.htm>>.

continue to apply in non-international armed conflicts.¹³⁸ Paragraph 2 of the preamble refers to the basic protection offered to the individual by HR instruments and para 3 of the preamble emphasises “the need to ensure a better protection for the victims of [internal] armed conflicts”¹³⁹

In an internal armed conflict the obligation of states to guarantee HR should be equally subject to the exercise of “effective control” over their territory.¹⁴⁰ A state cannot be expected to protect its nationals from violations of HR by insurgents or occupation forces when it has lost control over the part of the territory where the abuses occur.¹⁴¹ In such a situation, an obligation to protect individuals against HR violations by third parties would not be very reasonable as the state lacks power to enforce compliance.

C Relationship between HR and HL - the concept of “*lex specialis*”

After the ICJ had reaffirmed that the protection offered by HR conventions did not cease in case of armed conflict¹⁴² it found in its *Wall* Advisory Opinion that there were three possible situations as regards the relationship between HL and HR:¹⁴³

Some rights may be exclusively matters of [HL]; others may be exclusively matters of [HR]; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

The Court illustrated the *lex specialis* principle considering the application of the right not to be arbitrarily deprived of one’s life in art 6(1) ICCPR:¹⁴⁴

In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.¹⁴⁵

¹³⁸ Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 Isr Y B Hum Rts 1, 8.

¹³⁹ *Ibid* para 3.

¹⁴⁰ See Inter-American Court on Human Rights (IACtHR), *Velasquez-Rodriguez Case* (Judgment of 29 July 1988). Available on < http://www1.umn.edu/humanrts/iachr/b_11_12d.htm>, paras 166 and 174 - 176.

¹⁴¹ Nowak, *U.N. Covenant on Civil and Political Rights : CCPR commentary*, above n 97, 41, para 27, n 73; Thomas Buergenthal, “To Respect and to Ensure: State Obligations and Permissible Derogations”, in Louis Henkin(ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981) 72, 75; Theodor Meron, *Agora: The 1994 U.S. Action in Haiti: Extraterritorially of Human Rights Treaties* (1995) 89 AJIL 78, 79.

¹⁴² *Wall* Advisory Opinion, above n 75, para 106.

¹⁴³ *Ibid*.

¹⁴⁴ *Wall* Advisory Opinion, above n 75, para 105; referring to *Nuclear Weapons* Advisory Opinion, above n 75, para 25.

¹⁴⁵ In *Abella v Argentina* the IACHR took a similar approach. It stated that it could not resolve claimed violations of the non-derogable right not to be arbitrarily deprived of one’s life in art 4 of the American Convention on Human Rights (ACHR) by reference to HR alone. As regards violations during armed conflicts it necessarily had to look to HL, as the Convention itself would not contain any rules to distinguish civilians from combatants or other military targets and would not sufficiently specify when civilian casualties could be considered lawful consequence of military operations; *Abella v Argentina*, Report No. 55/97, para 161.

However, the ICJ left open the question of how the concept of *lex specialis* should be generally applied with regard to HR.¹⁴⁶ As Frowein has pointed out, the Court's reasoning cannot be generalised as it refers specifically to art 6(1) ICCPR which invites interpretation in the light of HL by limiting the prohibition to an "arbitrary" deprivation of life.¹⁴⁷ Other non-derogable HR provisions such as the prohibition of torture and slavery are formulated in absolute terms and do not contain any limitations comparable to the concept of arbitrariness.¹⁴⁸

Dennis interprets the application of the principle of *lex specialis* in situations of armed conflict as categorically excluding the application of HR.¹⁴⁹ This view can merely be seen as an attempt to deny the applicability of HR in armed conflicts through the back-door, as it is at odds with the ICJ's finding that HR also applies in times of war. Furthermore, Dennis' reasoning is inconsistent with the understanding of the principle of *lex specialis* as a conflict rule that is applied only when two laws disagree about the same subject matter and cannot be construed congruently.¹⁵⁰ HR and HL cannot be considered to always be in conflict with each other simply because of the fact that they both apply in belligerent situations. The existence of a normative conflict has to be determined with respect to the norms that apply in the given warfare situation.

Accordingly, other authors argue that the concept of *lex specialis* implies that a more specific HL rule takes precedence over a more general HR rule when both legal regimes provide contradictory norms with respect to the same subject matter.¹⁵¹ It would be a strange result when a specific conduct that is applied in accordance with HL - for example, a military operation that involves the killing of belligerents on the grounds of military necessity - would nevertheless constitute a violation of HR, where a much stricter proportionality test applies.¹⁵²

¹⁴⁶ See also Caroline E. Foster, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: The Advisory Jurisdiction of the International Court of Justice, Human Security and Necessity* (2005) 2 NZ YB Int'l Law 51, 84.

¹⁴⁷ Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 Isr YB Hum Rts 1, 12.

¹⁴⁸ *Ibid.* For example, art 2(1) ECHR states that "[n]o one shall be deprived of his life intentionally". It can hardly be argued that the contents of the term "intentionally" would change when it is determined by HL.

¹⁴⁹ Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 AJIL 119, 133, 139, 141. Dennis claims that "[w]hether or not [HRs] apply extraterritorially in the West Bank and Gaza, the reasonableness of Israel's actions in the occupied territories should have been evaluated on the basis of [HL]", *Ibid.*, 141.

¹⁵⁰ See e.g. Edmund Jan Osmańczyk, *Encyclopedia of the United Nations and International Agreements* (3rd ed, edited by Anthony Mango, Routledge, New York, 2003) 1316; "Beck's Law Dictionary": *A Compendium of International Law Terms and Phrases*. Available on <<http://www.people.virginia.edu/~rjb3v/latin.html>>.

¹⁵¹ Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation* (1998) 28 Isr YB Hum Rts 1, 9-11.

¹⁵² *Ibid.* 9; Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 22; Hans-Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law* (2004) 86 RICR 789, 797; Greenwood, *Rights at the Frontier - Protecting the Individual in Time of War*, above n 21, 285, 286; Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 266; Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons* (1997) 91 AJIL 417, 423.

This approach avoids indissoluble contradictions between special HL and general HR provisions, but does it accurately accommodate the ICJ's jurisprudence in both its *Wall* and its *Nuclear Weapons Advisory Opinion*? Why did the Court confirm the application of the right not to be arbitrarily deprived of one's life in armed conflicts and viewed HL merely as informing the interpretation of the term "arbitrary" rather than considering the right to life to be completely displaced by HL provisions?

Further guidance can be found in an outline that Martti Koskenniemi, chairman of the "Study Group on Fragmentation of International Law", prepared for the 55th session of the ILC.¹⁵³ In the outline Koskenniemi deals with the "function and scope of the *lex specialis* rule" in a more detailed manner.

He distinguishes between "two ways in which law takes account of the relationship of a particular rule to a general rule:"¹⁵⁴

[Firstly,] a particular rule may be conceived as an *exception* to the general rule. In this case, the particular derogates from the general rule.

[Secondly,] a particular rule may be considered an *application* of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand.

In both cases the point of the *lex specialis* rule would be to indicate which rule should be applied.¹⁵⁵

Lex specialis as an *exception* is either expressly authorised or explicitly prohibited by the relevant general law or - if the relevant general law itself remained silent on the matter - a question of interpretation.¹⁵⁶ The permission to derogate from certain HR provisions in situations of national emergency is an example of an expressly authorised type of exception.¹⁵⁷ However, the application of the *lex specialis* rule in this context must not result in the circumvention of the specific conditions set out by the derogation provisions. Therefore, the displacement of HR does not occur automatically but only provided that states comply with these specific conditions.¹⁵⁸ On the other hand, *jus cogens*¹⁵⁹ and in particular non-derogative HR provisions would illustrate an explicit prohibition of *lex specialis* as a deviating exception.¹⁶⁰

¹⁵³ Martti Koskenniemi, "The Fragmentation of International Law: Topic (a): The function and scope of the *lex specialis* rule and the question of 'self-contained regimes': An Outline", in preparation of the 55th Session of the ILC (5 May to 6 June and 7 July to 8 August 2003) [hereinafter *lex specialis* Outline] Available at < http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf>.

¹⁵⁴ *Ibid* 4.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid* 6.

¹⁵⁷ *Ibid* 7.

¹⁵⁸ See Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 279 (Greenwood is rejecting the *lex specialis* concept, though); The ICJ found that Israel remained bound by art 12(1) ICCPR as it did not notify a derogation as required by art 4(3) ICCPR; *Wall Advisory Opinion*, above n 75, paras 127, 128. On the other hand, Koskenniemi seems to assume that HR is automatically ousted by HL, Koskenniemi, *lex specialis Outline*, at 6.

¹⁵⁹ According to art 53 VCLT, *jus cogens* is "a peremptory norm of general international law ... accepted and recognized by the international community of states as a whole as a norm from which no

In contrast, *lex specialis* as an *application* may inform or elaborate general law in a particular situation.¹⁶¹ This is particularly true when the general law contains undetermined legal notions whose interpretation requires specific guidance for their application in the given situation. Sometimes, even non-derogable rights might necessitate such recourse to *lex specialis* as an *application*. The determination of “arbitrariness” in art 6(1) ICCPR by HL in the ICJ’s *Nuclear Weapons* Advisory Opinion is an example.¹⁶²

However, Koskenniemi’s reasoning may also raise further questions. Koskenniemi finds that “HL must be regarded as *lex specialis* in relation to - and thus override - rules laying out the peace-time norms relating to the same subjects.”¹⁶³ But is this assumption always true? Is HL always *lex specialis* if it regulates the same subject matter as HR? And does the application of HL as *lex specialis* as an *exception* impede further recourse to HR principles?

Koskenniemi’s explanation for the rationale of the *lex specialis* rule seems to point to the opposite conclusion. He argues that a special norm overrides a general provision as it “is more to the point than a general one and regulates the matter more effectively than general rules do.”¹⁶⁴ Furthermore, Koskenniemi states that¹⁶⁵

no rule can be determined as general or special in the abstract, without regard to the situation in which its application is sought. Thus, a rule may be applicable as general law in some respect while it may appear as a particular rule in other respects.

However, HL provisions do not necessarily provide a more effective or appropriate solution of a particular situation solely because this situation occurs during a period of armed conflict. The ICSECR, for example, might offer clearer and more detailed provisions with regard to the right to health than the corresponding obligations in respect of health care under art 55 IV GC.¹⁶⁶ Therefore, there is no reason why - during a belligerent occupation - the application of art 55 should not be informed and elaborated by arts 7, 10 and 12 ICESCR or otherwise complemented by HR provisions. As part IV will demonstrate, there are several other situations of armed conflict where HR may provide more effective and more appropriate solutions than HL. Thus, the concept of *lex specialis* as an *exception* does not generally impede the recourse to HR provisions.

Finally, it is arguable whether the same is true for the concept of *lex specialis* as an *application*. The ICJ found in its *Wall* Advisory Opinion that the term “arbitrary” in art

derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

¹⁶⁰ Koskenniemi, *lex specialis* Outline, at 7.

¹⁶¹ *Ibid* 6.

¹⁶² *Ibid* 6. Similarly, the HRC found that “[w]hile, in respect of certain Covenant rights, more specific rules of [HL] may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”; HRC, General Comment 31, para 11.

¹⁶³ Koskenniemi, *lex specialis* Outline, at 6.

¹⁶⁴ *Ibid* 4.

¹⁶⁵ *Ibid* 5.

¹⁶⁶ Hans-Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law* (2004) 86 RICR 789, 795.

6(1) ICCPR should be determined by HL.¹⁶⁷ However, if a determination of the term “arbitrary” exclusively refers to HL principles - that is particularly to the military necessity test - the right to life in art 6(1) ICCPR would add nothing at the substantive level to the provisions of the law of armed conflict.¹⁶⁸ Why did the ICJ apply art 6(1) ICCPR to situations of armed conflict instead of directly referring to HL provisions in the first place? One might argue that an application of the right to life under HR may, at least, permit HR treaty bodies to exercise jurisdiction in relation to the right.¹⁶⁹ The fact that a violation of HL is considered a violation of HR may also highlight the moral damnability of the conduct that violates the right to life. However, as the application of the right to life would only be formal, it would not enhance the protection of individuals in times of armed conflict. The application of HR would be rather superfluous as it would not change the substance of the law of armed conflict at all. Therefore, it is more convincing to argue that the interpretation of “arbitrary” has to provide for the consideration of both HL and HR.

On the one hand the construction of “arbitrary” has to be made in the light of the provisions of HL, particularly the military necessity test. However, on the other hand, this interpretation also has to take into account HR - in particular the right to life and the proportionality principle. Consequently, it would become more difficult to justify military actions that involve the collateral killing of civilians by “military necessity”. The substance of the law of armed conflict would change and the application of the right to life would reinforce the protection of individuals in times of war. Thus, the interpretation of undetermined legal notions through *lex specialis* as an *application* has to provide for an interaction between HR and HL principles.

After having resolved in the affirmative the question of whether HR and HL may apply simultaneously, part IV will further examine the potential for interaction and cross-pollination between the two bodies of law.

IV INTERACTION BETWEEN HR AND HL

A General Considerations

Whereas some authors see great potential for recourse to HR in terms of a “humanisation” of HL,¹⁷⁰ other scholars doubt that general HR guarantees can be invoked to trump more detailed and specific HL provisions.¹⁷¹ The latter argue that HR

¹⁶⁷ *Wall* Advisory Opinion, above n 75, para 105; referring to *Nuclear Weapons* Advisory Opinion, above n 75, para 25.

¹⁶⁸ See also Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 287.

¹⁶⁹ See below part IV D.

¹⁷⁰ See e.g. Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239.

¹⁷¹ Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 AJIL 119, 139-140; Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 2; Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 285; Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws* (1982) Am

is not designed to be respected by military personnel which need detailed and practical provisions in terms of comprehensive duties.¹⁷² For example, the III GC does not simply provide that the wounded and prisoners of war must not be “treated inhumanly”. It imposes positive duties to protect those persons and regulates matters like the running of a prisoner of war camp or the collection and care of wounded persons in a very detailed way.¹⁷³

HL may afford more specific protection to individuals in particular battle-field situations. However, military decisions during more complex operations often involve comprehensive strategic planning beforehand, which opens up scope for HR considerations, for example, when assessing the legitimacy of causing collateral damage to civil objects. Furthermore, military personnel rarely rely directly on HL provisions, but receive further guidance from military codes of conducts and special military training. There is no reason why such military codes or education should not allow for HR considerations.

There are many situations where the sometimes fragmentary and undetermined rules of HL could be supplemented by the application of HR, or complemented by the comprehensive standards developed by HR treaties and tribunals respectively. In particular, the *interpretation* of rights and duties has to refer to both areas of law.¹⁷⁴ As illustrated in part III, resort to HL is for example required to determine the meaning of “arbitrariness” in art 6(1) ICCPR during times of armed conflict.¹⁷⁵ Similarly, the interpretation of the term “inhumane treatment” found in HR law¹⁷⁶ necessitates recourse to the III GC when it is applied in the specific context of a prisoner of war camp.¹⁷⁷ Conversely, common art 3(1)(d) to the Geneva Conventions that requires a court to afford all the “judicial guarantees” deemed “indispensable by civilised people” could hardly be interpreted without recourse to HR instruments.¹⁷⁸ In the same manner, the application of the general guarantee of an independent and impartial court in art 84(2) III GC could be informed and supplemented by recourse to HR treaties and doctrine, which have developed the concept of guarantee of independence and impartiality in much greater detail.¹⁷⁹

B International Armed Conflicts

U L Rev 935, 940; see also IACHR, *Abella v Argentina*, OEA/Ser.L/V/II.98 (13 April 1998), para 159.

¹⁷² Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 283.

¹⁷³ *Ibid.*

¹⁷⁴ Hans-Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law* (2004) 86 RICR 789, 795.

¹⁷⁵ The relevant HL particularly includes the standards set out in arts 13-17 Additional Protocol II and customary HL.

¹⁷⁶ For example, art 3 ECHR, art 7 ICCPR and art 5(2) ACHR.

¹⁷⁷ Hans-Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law* (2004) 86 RICR 789, 795.

¹⁷⁸ *Ibid.*

¹⁷⁹ Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 287.

International armed conflicts provide potential for interaction between HR and HL provisions particularly with respect to the protection of specific persons and with regard to individuals under belligerent occupation.

1 *Protection of Persons not Protected under HL*

In particular circumstances, HL does not offer any or, at least, any sufficient protection to specific persons, who therefore could benefit from HR guarantees.

Particularly a state's own nationals could profit from HR provisions. HL merely protects nationals of one belligerent state against the acts of an adversary state, but it does not normally protect persons from ill-treatment by their own state.¹⁸⁰ Article 4(1) IV GC expressly provides only for the protection of persons "in the hands of a party or occupying power of which they are not nationals." Greenwood suggests, for example, that the right to life under HR might be invoked in times of armed conflict to reconceive the execution of deserters or citizens suspected of high treason.¹⁸¹

Equally, nationals of a neutral state that are involved in an armed conflict are not sufficiently protected by HL. According to art 4(2) IV GC such persons are not protected when they "find themselves in the territory of a belligerent state" and "the state of which they are nationals has normal diplomatic representation in the state in whose hands they are."¹⁸² Again, the application of HR, or at least its non-derogable provisions, would benefit the protection of the individual.¹⁸³

2 *Occupied Territories*

HR provisions are also relevant to the treatment of prisoners and civilians in occupied territories. The role performed by the occupier resembles in many respects the exercise of public powers in a domestic law-enforcement context.¹⁸⁴ Therefore, military occupation creates the expectation that HR norms usually associated with peaceful governance should apply to supplement the sometimes inadequate protection offered by HL.¹⁸⁵ As many of the rules of HL relating to belligerent occupation are out-dated and were not designed to apply in long-term occupations such as that in the Middle East,¹⁸⁶ there is considerable scope for reference to sometimes more modern HR standards as a complement to HL.¹⁸⁷

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² This formulation implies that nationals of a neutral state are, at least, protected in occupied territories.

¹⁸³ Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 266; Greenwood, *Rights at the Frontier - Protecting the Individual in Time of War*, above n 21, 287.

¹⁸⁴ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 27, 28.

¹⁸⁵ Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967* (1990) 84 AJIL 44, 70-74.

¹⁸⁶ See in particular, arts 42-56 of the Regulations on the Laws and Customs of War on Land, annexed to Hague Convention No. IV 1907.

¹⁸⁷ Greenwood, *Rights at the Frontier - Protecting the Individual in Time of War*, above n 21, 288.

For example, Greenwood proposes to scrutinise the discretion of an occupying state to detain suspects without trial and to restrict freedom of expression, association and movement against the criteria of necessity and proportionality developed under HR.¹⁸⁸ Foster takes a similar approach with regard to population transfers under art 49(1) and (2) of the IV GC. She suggests that the test elaborated under the ICCPR for assessing the necessity of HR restrictions for the protection of national security and public order could provide insights relevant for the evaluation of whether the security of the population or imperative military reasons demand forcible transfer or deportation of protected persons.¹⁸⁹

Conversely, a belligerent occupation may of course involve situations where the application of HL is more appropriate or where HL can benefit the application of HR. For example, the duties of States regarding missing persons are relatively underdeveloped under HR.¹⁹⁰ By contrast, the III and IV GC oblige the occupying power to provide detailed information about detained persons, notify their death and search for persons who have disappeared.¹⁹¹ Finally, HL conventions may provide more reliable protection to individuals than HR treaties as they generally do not allow for derogation on grounds of emergency.¹⁹²

C *Non-International Armed Conflicts*

Finally, non-international armed conflicts may be particularly susceptible for recourse to HR, since the relevant HL provisions are relatively underdeveloped and provide a high threshold of application.

I *Low Degree of Regulation*

As already pointed out in part III B, common art 3 to the Geneva Conventions merely provides for the application of certain fundamental standards.¹⁹³ Although these standards are supplemented by Additional Protocol II and customary international law,

¹⁸⁸ *Ibid.*

¹⁸⁹ Caroline E. Foster, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: The Advisory Jurisdiction of the International Court of Justice*, *Human Security and Necessity* (2005) 2 NZ YB Int'l Law 51, 84.

¹⁹⁰ Hans-Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law* (2004) 86 RICR 789, 795.

¹⁹¹ See in particular arts 136 -141 (Section V) IV GC and art 120(2) as well as arts 122 - 125 (Part V) III GC; see also Walter Kälin (ed), *Human Rights in Times of Occupation: The case of Kuwait* (Stimpfli, Bern, 1994) 27.

¹⁹² Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 267. However, HL contains some exceptions based on imperative military reasons, military necessity or reasons of security (e.g., arts 49(2), 64(1), 78(1) IV GC) and allows for derogations with regard to specific persons (art 45(3) Protocol I).

¹⁹³ See above part III B, no. 138.

the rules of HL applicable to internal conflicts are still less detailed than, and not as accepted as, the comparable provisions that apply to international conflicts.¹⁹⁴

Accordingly, HR standards could complement underdeveloped HL provisions and offer guidance for the interpretation of undetermined legal notions. As indicated above, it may be necessary to look to art 14 ICCPR and regional provisions such as art 6 ECHR as well as to the corresponding jurisprudence in order to get a better understanding of what common art 3(1)(d) to the Geneva Conventions actually implies by requiring sentences and executions to be carried out by a regularly constituted court “affording all the judicial guarantees which are *recognised as indispensable by civilised peoples*.”¹⁹⁵

2 Threshold of Application

An interaction between HR and HL may also enhance the protection of individuals when it is taken into account that states can easily contest the application of HL in internal armed conflicts.¹⁹⁶ This is due to the fact that common art 3 does not define what level of violence is required to constitute an “armed conflict not of an international character” that triggers the application of HL.¹⁹⁷ Article 1(1) Additional Protocol II refers to the conditions set out by common art 3 and establishes even a higher threshold of application.¹⁹⁸ It requires the insurgents or rebel forces to be “organized” and to “exercise such a control over a part of [the state’s] territory as to enable them to carry out sustained and concerted military operations and to implement [the] protocol.”¹⁹⁹ As states only reluctantly concede that they have lost control over parts of their territory,²⁰⁰ Additional Protocol II has seldom been formally applied.²⁰¹ Therefore, reference to HR treaties may prove more effective in influencing the behaviour of states.²⁰²

¹⁹⁴ Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 288, 289; Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 274; Kellenberger, *Protection Through Complementarity of the Law*, above n 11. Additional Protocol II does not significantly increase the protection granted under common art 3 as it is particularly not recognised by states parties that are often involved in non-international conflicts. Furthermore, Additional Protocol II is not as detailed as HL provisions that apply to international conflicts; Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 288, 289.

¹⁹⁵ (Emphasis Added) Hans-Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law* (2004) 86 RICR 789, 795; Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 289.

¹⁹⁶ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 25; Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 260, 261; Kellenberger, *Protection Through Complementarity of the Law*, above n 11; Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 289.

¹⁹⁷ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 25; Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 260, 261; Kellenberger, *Protection Through Complementarity of the Law*, above n 11. Some criteria have been developed: In *Abella v Argentina* the IACHR relied on the “concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence”; *Abella v Argentina*, para 155.

¹⁹⁸ Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 261, Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 289.

¹⁹⁹ Additional Protocol II, art 1(1).

²⁰⁰ See Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 289.

²⁰¹ Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 261.

²⁰² See Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 289.

Finally, mere “internal disturbances” may call for a simultaneous application of HR and HL. Article 1(2) Additional Protocol II states that the protocol does 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.” This provision is regarded as reflecting customary international law affecting not only the application of the protocol itself but of HL in general.²⁰³ Such “internal disturbances and tensions” may, however, include situations where the level of violence reaches that of a state of public emergency allowing a state to derogate from most of its HR obligations.²⁰⁴

The consequence of a strict separation between HR and HL would be that neither HL nor HR provisions would then apply.²⁰⁵ However, there is no reason why in a public emergency where the level of violence does not reach that of an internal armed conflict a state should be permitted to take measures which would be illegal both in times of peace as well as in times of war.²⁰⁶ To close this gap of protection and to provide legal security, authors suggested the elaboration of a set of non-derogable fundamental humanitarian standards drawn from both HR and HL that applies regardless of the characterization of the situation.²⁰⁷

3 *Non-governmental forces*

Internal armed conflicts often involve infringements by non-governmental forces. As HR is generally interpreted as creating obligations only for governments,²⁰⁸ the invocation of HR provisions may not always be effective in practice.²⁰⁹ On the other hand, HL binds all parties to an armed conflict irrespective of whether they are states or non-state actors.²¹⁰ Therefore, reference to HL may be more effective.²¹¹

Another issue is that of protecting individuals against HR violations by private actors that do not rise to the level of crimes under HL. One approach is to interpret the HR obligations of a state to also include the protection of individuals against private

²⁰³ *Ibid* 290.

²⁰⁴ See e.g. art 4(1) ICCPR, art 15(1) ECHR and art 27(1) ACHR.

²⁰⁵ Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 273; Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 290.

²⁰⁶ Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 291.

²⁰⁷ Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument* (1983) 77 AJIL 589; Theodor Meron, *Human Rights in Internal Strife: Their International Protection* (Grotius Publications, Cambridge, 1987); Theodor Meron & Allan Rosas, *A Declaration of Minimum Humanitarian Standards* (1991) 85 AJIL 375.

²⁰⁸ See *Abella v Argentina*, para 174; Kellenberger, *Protection Through Complementarity of the Law*, above n 11; Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 290.

²⁰⁹ Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 273.

²¹⁰ Kellenberger, *Protection Through Complementarity of the Law*, above n 11; Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 290;

²¹¹ Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 290.

violations that are committed within the *jurisdiction* of that state.²¹² However, as this protection is subject to the exercise of “jurisdiction” and, thus, “effective control” over a territory, individuals are unprotected if private insurgents gain effective control over, at least, parts of a state’s territory.²¹³ As severe abuses of civilians by private actors are more likely to occur when a state’s public order system has broken down and the state has lost control over its territory, this approach may not be very promising in practice.

A second approach seeks to impose duties on individuals to trigger penal responsibility for serious violations of HR, on the model of the repression of grave breaches of HL. For example, art 2 of the Declaration of Minimum Humanitarian Standards²¹⁴ states that its “standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination.”²¹⁵ Another example where personal responsibility is invoked in a HR context is under the African Charter on Human and Peoples’ Rights.²¹⁶ Article 28 of the Charter provides that “[e]very individual *shall have the duty* to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”²¹⁷ Such an approach could help lessen impunity and contribute to greater compliance with HR. On the other hand, authors fear that the introduction of individual obligations in a rights-based system might entail that rights and obligations become tied which could induce states to allege disrespect of obligations as an excuse to disregard basic rights of insurgents.²¹⁸

D Application and Enforcement of HL by HR Bodies

Finally, it remains to be discussed whether HR treaty bodies are entitled to apply and to enforce HL provisions.

Some authors and governments argue that HR bodies have a mandate only to review alleged violations of provisions incorporated in those treaties which created them.²¹⁹ For

²¹² See Inter-American Court on Human Rights (IACtHR), *Velasquez-Rodriguez* Case (Judgment of 29 July 1988). Available on <http://www1.umn.edu/humanrts/iachr/b_11_12d.htm>, paras 166 and 174 - 176 (Emphasis added).

²¹³ See part III B.

²¹⁴ Declaration of Minimum Humanitarian Standards (Declaration of Turku) U.N. Doc. E/CN.4/1995/116 (1995). Available at <<http://www1.umn.edu/humanrts/instatee/1990b.htm>>.

²¹⁵ See Theodor Meron & Allan Rosas, *A Declaration of Minimum Humanitarian Standards* (1991) 85 AJIL 375, 378.

²¹⁶ African [Banjul] Charter on Human and Peoples’ Rights (Adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 Rev 5, 21 I.L.M. 58 (1982). Available on <<http://www1.umn.edu/humanrts/instatee/z1afchar.htm>>.

²¹⁷ (Emphasis added). See also art 29 of the Charter.

²¹⁸ Provost, *International Human Rights and Humanitarian Law*, above n 2, 345.

²¹⁹ See e.g. Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 AJIL 119, 121; government respondents in *Banković v Belgium and Others* advocating that the ICJ and the ICC were created to deal with the conduct of states engaged in military action; *Banković v Belgium and Others*, 123 ILR 94 (2001), at 105, para 43.

example, the HRC can receive individual claims of violations only with regard to alleged violations of rights guaranteed under the ICCPR.²²⁰

Given the degree of interaction between HR and HL, and their sharing of many principles, it is, however, difficult to suggest that HR bodies have to refrain from applying principles of HL.²²¹ A HR treaty body may necessarily refer to HL when it is confronted with the infringement of certain HR provisions in times of armed conflict.²²² This is true particularly for HR provisions that imply undetermined legal notions that need to be interpreted in the light of a given warfare situation. As noted above, a HR tribunal must resort to HL to determine whether a killing during an armed conflict has been “arbitrary” in terms of art 6(1) ICCPR.

V CONCLUSION

The application of HR and HL is not mutually exclusive. As HR applies in times of war and in areas outside a state’s territory, HR obligations and HL provisions may interact. Which provisions apply *in concreto* depends on the degree of “effective control” exercised over a territory in the given warfare situation. On the one hand, the degree of “effective control” may be too low to expect states to enforce, for example, rights under the ICSECR. On the other hand, it is arguable that a lower degree of “effective control” over a territory is sufficient to require states to ensure at least fundamental HR such as the right not to be arbitrarily deprived of one’s life. Reliable criteria that clarify what actually constitutes “effective control” need to be developed.

The relationship between HR and HL is regulated by the concept of *lex specialis*. If HL provides more detailed and appropriate provisions in a given warfare situation it overrides the norms of HR. Otherwise, more comprehensive HR standards apply in the light of HL to complement the sometimes fragmentary and undetermined rules of HL. The interaction between HR and HL is mutually supportive. Each body of law offers in some areas, greater protection than the other²²³ and has important and constructive contributions to make towards closing gaps with respect to the enjoyment of fundamental rights.²²⁴ In an international armed conflict, the application of HR would enhance the protection of the citizens of belligerent states, of nationals of neutral states and of individuals that live under occupation. In a non-international armed conflict, the application of HR is particularly promising, as the relevant HL is relatively underdeveloped and subject to a high threshold of application. Conversely, HL may better protect individuals against violations by non-state actors.

²²⁰ Conversely, a HL body like the International Fact Finding Commission established under art 90 of the Additional Protocol I has jurisdiction restricted to HL treaty provisions.

²²¹ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 24.

²²² Theodor Meron, *The Humanization of Humanitarian Law* (2000) 94 AJIL 239, 270; Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 278, 291.

²²³ Provost, *International Human Rights and Humanitarian Law*, above n 2, 9.

²²⁴ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 34.

Overall, there is considerable potential for HR provisions to enrich the application of HL in armed conflicts. This pollination has to take into account the specificity of wartime conditions.²²⁵ Authors consistently remark that HR cannot be applied in an unqualified manner to the conduct of armed conflict, but has to be integrated in a sensible way into the structure of HL.²²⁶ They argue that intentional destruction of life and property is a necessary aspect of hostilities, and that collateral damage and injury - even to non-combatants, civilian property and the natural environment - is an inevitable consequence.²²⁷ However, the setting forth of “realistic rules”²²⁸ should not imply that the HR lawyer has to “abandon any notion that the broad principles of HR can transform the nature of warfare.”²²⁹ The purpose of law is not merely to accommodate the cruelties of war but also to develop more progressive standards of warfare that may become acceptable in the long run.

²²⁵ See e.g. Provost, *International Human Rights and Humanitarian Law*, above n 2, 117; Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 291, 292.

²²⁶ Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons* (1997) 91 AJIL 417, 423.

²²⁷ *Ibid.*

²²⁸ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict* (2004) 98 AJIL 1, 34.

²²⁹ Greenwood, *Rights at the Frontier -Protecting the Individual in Time of War*, above n 21, 292.