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Challenges in applying human rights law to armed conflict

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Abstract

The debates over the relationship between International Humanitarian Law and International Human Rights Law, have often focused on the question of whether human rights law continues to apply during armed conflict, and if so, on how these two bodies of law can complement each other. This article takes the continuing applicability of human rights law as an accepted and welcome starting point, and proceeds to lay out some of the challenges and obstacles encountered during the joint application of IHL and Human Rights Law, that still need to be addressed. These include extra-territorial applicability of human rights law; the mandate and expertise of human rights bodies; terminological and conceptual differences between the bodies of law; particular difficulties raised in non-international armed conflicts; and the question of economic, social and cultural rights during armed conflict.

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The applicability of human rights law to armed conflict has been the subject of extensive discussion over the past few decades.¹ Much of this debate centres upon the question of whether human rights law continues to apply once we enter the realm of armed conflict. While the International Court of Justice (ICJ), in its Nuclear Weapons Advisory Opinion,² did state the applicability of human rights

* This article builds upon a presentation given by the author at the conference held by the International Committee of the Red Cross on 30–31 May 2005 at the Netherlands Ministry of Foreign Affairs, The Hague, to mark the publication of the ICRC study on customary international humanitarian law.

law, the use of the term *lex specialis* might have been construed as support for a claim that whereas human rights law then does not disappear, it nevertheless is in effect displaced by international humanitarian law (IHL).

The more recent Advisory Opinion on the Wall, together with the views of UN human rights bodies,³ have clarified that human rights law is not entirely displaced and can at times be directly applied in situations of armed conflict.⁴ While there might still be pockets of resistance to this notion,⁵ it is suggested here that the resisters are fighting a losing battle and should lay down their arms and accept the applicability of human rights law in times of armed conflict. Meanwhile, many of the views supporting the applicability of that law are focused primarily upon explaining why it should and does apply during armed conflict, and on how in these situations the two bodies of law can work concurrently, complement (or perhaps even converge with) each other in times of need.⁶ The arguments contained in the relevant works have played a vital role in advancing this approach, and have been at the heart of the growing acceptance of the continuing applicability of human rights during conflict. Accepting applicability and understanding how the legal regimes can coexist is not, however, the end of the story. When we actually come to apply human rights law in practice to situations of armed conflict, certain difficulties do appear. The road of joint applicability has a number of obstacles along the way that will need to be addressed if we are to have a smooth ride. The focus of the arguments is now shifting from the question of if human rights law applies during armed conflict to that of how it applies, and to the practical problems encountered in its application. This paper concentrates on some of those challenges.

- 1 Amongst others, see G.I.A.D. Draper, "The relationship between the human rights regime and the laws of armed conflict," *Israel Yearbook on Human Rights*, Vol. 1, 1971, p. 191; L. Doswald-Beck and S. Vité, "International humanitarian law and human rights law," *International Review of the Red Cross*, No. 293, March-April 1993, p. 94; R.E. Vinuesa, "Interface, correspondence and convergence of human rights and international humanitarian law," *Yearbook of International Humanitarian Law*, Vol. 1, T.M.C. Asser Press, The Hague, 1998, pp.69–110; R. Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002; H. Heintze, "On the relationship between human rights law protection and international humanitarian law," *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, p. 798.
- 2 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion, 8 July 1996, *ICJ Reports* 1996, para. 25.
- 3 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports* 2004; Human Rights Committee, General Comment 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) para. 3; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel; 31/08/2001. E/C.12/1/Add.69. For further support for the applicability of human rights law during conflict, see for instance the detailed arguments contained in Doswald-Beck and Vité, and in Heintze, *op. cit.* (note 2).
- 4 In the words of the Court "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law." ICJ, Advisory Opinion, *ibid.*, para.106.
- 5 See for example some of the arguments raised in M. Dennis, "ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of human rights treaties extraterritorially in times of armed conflict and military occupation," *American Journal of International Law*, Vol. 99, 2005, p. 119; at a June 2005 conference in Oslo to mark the ICRC study on customary IHL, *op. cit.* (note 1), one of the participants expressed the view that human rights law is designed only for peacetime and IHL is the only law for times of war.
- 6 For example, see Doswald-Beck and Vité; Vinuesa; Provost; and Heintze; *op. cit.* (note 2).

In certain areas it is clear how and why IHL and human rights law could complement and reinforce each other — most notably where the issues of deprivation of liberty and judicial guarantees are concerned.⁷ But problems do exist on a number of other fronts, and a few of them will be addressed in this article. The first of the challenges raised (extraterritorial applicability of human rights obligations) has received plentiful attention⁸ and will therefore only be summarized here. Yet the intention is not to repeat the debate on some of the more well-covered topics. Other challenges, in particular in the second half of this article, are topics that would appear to be deserving of extensive further analysis.

Extraterritorial applicability of human rights obligations

The first serious difficulty that must be confronted lies in the question of whether there are not after all limitations to the scope of applicability of human rights law, and whether it applies to all situations of armed conflict. This question revolves largely around the issue of extraterritorial applicability of human rights obligations.

The problem of extraterritorial obligations is primarily of relevance to international armed conflict, since it is in such situations that a State is likely to be operating outside its borders⁹ and that questions are raised as to whether human rights obligations can extend to actions of State forces outside the State's recognized borders, even after accepting that human rights law has not disappeared with the outbreak of conflict.

There is not enough space here to give a detailed analysis of all cases of and views on extraterritorial applicability. The following is therefore an attempt to set out the main concerns and approaches to this issue.¹⁰

Case-law stretching from the European case *Loizidou* to the recent UK case *Al-Skeini*¹¹ gives strong support for the contention that human rights obligations can extend to areas under effective control of the State. Occupied territories over which authority has been clearly established can come within the ambit of the human rights obligations of the State. This was the case in Northern Cyprus and in the occupied Palestinian territories. This view is supported by

7 See the "Fundamental guarantees" chapter in ICRC study, *op. cit.* (note 1), Vol. 1 pp. 299–383.

8 For an example of a comprehensive publication devoted to this subject, see F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2004.

9 Non-international armed conflicts that have crossed the Additional Protocol II threshold, and in which the State engages in military action in territory over which the armed opposition group, and not the State, exercises *de facto* control, might theoretically be subject to similar questions, though there are marked differences between such conflicts and international armed conflicts.

10 For detailed analysis, see the examination of the case-law contained in High Court of Justice, Queen's Bench Division, Divisional Court, *R (Al-Skeini and others) v. Secretary of State for Defence*, 14 December 2004; see also Françoise Hampson and Ibrahim Salama, "Working paper on the relationship between human rights law and international humanitarian law," UN Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2005/14 21 June 2005, paras. 78–92.

11 ECHR, *Loizidou v. Turkey (Preliminary Objections)* 40/1993/ 435/514, paras. 62–64; *Al-Skeini, ibid.*

human rights bodies, and was recently clearly stated by the International Court of Justice.¹²

The essence of the extension of obligations to occupied territory is based on the analogy to national territory, in that occupied territory is in effect under the authority and control of the occupying State. At the same time, occupied territories in which significant hostilities are occurring,¹³ as was the case in parts of Iraq, remain controversial with regard to the human rights obligation of the State, as evidenced in *Al-Skeini*.¹⁴

However, even in other situations in which the State does not control the whole territory, there may be circumstances in which human rights obligations do extend extraterritorially, for instance when the State is running a detention facility outside its borders. The formula presented by the UN Human Rights Committee (HRC) speaks of protecting “anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”¹⁵

The first part of this phrase can be construed fairly widely and could potentially include anyone in the hands, even only temporarily, of State agents abroad. The HRC case of *Lopez Burgos* and the *Ocalan* case of the European Commission of Human Rights (ECHR) indicate that human rights obligations can be attached to extraterritorial actions of State agents in which they have authority and control over an individual.¹⁶ While in these situations the scope of relevant human rights obligations might be narrower than in an occupied territory, it could nevertheless be argued that State agents are bound to respect those human rights obligations that they have the power to affect. With this approach, a key consideration is whether a violation resulted directly from circumstances over which the State had control, whether or not it also had overall control of the territory in which the violation occurred.¹⁷

It should be pointed out that acceptance that human rights law may extend to extraterritorial actions does not rule out the consideration that if these actions are taking place in the context of an armed conflict, the content

12 *Legal Consequences Adv. Op., op. cit.* (note 4), paras. 107–112; Concluding Observations of the Human Rights Committee: Israel, 18 August 1998, CCPR/C/79/Add.93; *Loizidou, op. cit.* (note 12).

13 The occurrence of hostilities after a situation of occupation has been established (as opposed to the hostilities leading up to an occupation), gives rise to a number of problems. Some of these are addressed in N. Lubell, “The ICJ Advisory Opinion and the separation barrier: A troublesome route,” *Israel Yearbook on Human Rights*, Vol. 35, 2005, pp. 294–299.

14 See the distinction made by the Court between the first five claimants and the sixth claimant. *Al-Skeini, op. cit.* (note 11), paras. 284–285.

15 General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.10.

16 HRC, 29 July 1981, UN Doc.A/36/40, 176, Communication No. 52/1979; ECHR, 46221/99, Judgment 12 March 2003; Grand Chamber Judgment, 12 May 2005.

17 See M. Scheinin, “Extraterritorial effect of the International Covenant on Civil and Political Rights,” and R. Lawson, “Life after Bankovic: On the extraterritorial application of the European Convention on Human Rights,” but also D. McGoldrick, “Extraterritorial application of the International Covenant on Civil and Political Rights,” all in: *Extraterritorial Application of Human Rights Treaties, op. cit.* (note 9). See also Sub-Commission working paper, *op. cit.* (note 11), paras. 86–91.

of the rights may need to be interpreted in light of applicable rules of IHL. The example usually given for such a situation is the interpretation of the right to life in accordance with IHL rules on how and against whom force may be used during an armed conflict.¹⁸

In summary, it can probably be safely said that human rights obligations may sometimes extend extraterritorially. There is, however, still disagreement on when the obligations actually come into play:

- first, with regard to “effective control” in occupation there may be a problem in areas where hostilities continue;
- secondly, as was seen after the *Bankovic* decision,¹⁹ there are debates on what constitutes control (e.g. whether there is a difference between ground troops or air power,²⁰ and whether control over the consequences for the individual is enough without control over the territory), and the particular difficulties of regional systems covering situations outside the region;
- and thirdly, with regard to the HRC formulation of “within the power,” it might well be argued that the obligations probably do not extend to extraterritorial battlefield conduct,²¹ but do exist once people have been removed from the battlefield and placed in a detention facility run by the State — though where the obligations begin along the line between the two is unclear.

All in all, it seems that human rights law obligations can extend extraterritorially and be relevant to international armed conflict, but it is still unclear exactly how far that extension can be stretched.

Another point to be made is that recognition of certain elements of human rights law as part of customary international law might also advance the argument of human rights obligations extending beyond the territory of the State. Support for this comes from the US Operational Law Handbook 2004, which clearly accepts that US forces in extraterritorial operations can be bound by customary human rights law.²² Progress on this front would depend on how the customary status of human rights law is assessed, both in content and in rules of applicability. Considering the period of time and amount of effort involved in the ICRC study on IHL, it is unfortunately unlikely that an equally comprehensive study on customary international human rights law will be available in the very near future.

18 *Nuclear Weapons*, Adv. Op., *op. cit.* (note 3).

19 ECHR, *Bankovic and others v. Belgium and 16 Other Contracting States*, Case No. 52207/99, 12 December 2001.

20 There is a risk that basing the notion of control on the existence of ground troops while excluding the possibility of violations through use of air power would mean that States can choose the latter in order to avoid censure for human rights violations. For this and more, see note 18 above.

21 See presentation by D. Kretzmer, “The law of armed conflict: Problems and prospects,” Chatham House, 18–19 April 2005. Available on < <http://www.riia.org/pdf/research/il/ILParmedconflict.pdf> >, (last visited on 24 January 2006).

22 Berger, Grimes & Jensen (eds.), *The US Operational Law Handbook 2004*, Chapter 3, Section II.

The mandate and expertise of human rights bodies

From the above, and as will be seen later on in this section, it seems not only that human rights bodies are of the opinion that human rights law is relevant to armed conflict, but also that they are quite ready to actually scrutinize such situations, at least so long as they occur within the territory of a State or areas under its effective control. This brings us to the second challenge — whether human rights bodies have the mandate and necessary expertise to evaluate military operations.

Many of the human rights bodies have been established under a treaty. Their mandate would at first sight appear to be limited to monitoring the obligations contained in the relevant treaty. Thus the UN Human Rights Committee is mandated to discuss violations of obligations contained in the International Covenant on Civil and Political Rights, as is the European Court of Human Rights for the European Convention, and so on.

The apparent implication is that although they may — as seen earlier — have the territorial jurisdiction to deal with factual situations of armed conflict, their pronouncements would seem to be generally limited to violations of human rights contained in the relevant treaty, as opposed to pronouncing on violations of IHL. In the recent Chechen cases of *Isayeva* and others,²³ for example, the European Court dealt with a non-international armed conflict, but discussed only violations of human rights, not IHL.

There are, however, certain possibilities for these bodies to discuss IHL, since most of the treaties do contain references to other applicable law, for instance in articles covering derogation.²⁴ Within the regional bodies, the Inter-American system has had noteworthy experience in the use of IHL. In the *Tablada (Abella)* case,²⁵ the Commission made direct use of IHL and in particular of Article 3 common to the four Geneva Conventions of 1949, stating that human rights law did not give them enough tools to analyse the case in hand. The Commission repeated this in the *Las Palmeras* case, declaring that Colombia had violated the said Common Article 3. But the Inter-American Court was not pleased with this outcome and ruled that neither the Commission nor the Court had the mandate to make direct pronouncements on violations of IHL.²⁶ The possibility of using IHL to interpret human rights law obligations in situations of armed conflict, albeit without directly pronouncing upon IHL obligations, was still left open. This use of IHL as a legitimate tool of interpretation was repeated in a later case, *Bamaca Velasquez*.²⁷

23 ECHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Case No.57947/00, 57948/00 and 57949/00, 24 February 2005.

24 See discussion of this approach in A. Reidy, “The approach of the European Commission and Court of Human Rights to international humanitarian law,” *International Review of the Red Cross*, No. 324, September 1998, pp. 514–516.

25 Inter-Am.CHR, *Juan Carlos Abella v. Argentina*, Case No. 11.137, Report No. 55/97, 18 November 1997, para. 271.

26 Inter-Am.CHR, *Las Palmeras v. Colombia*, Case No. 67, Judgment on Preliminary Objections, 4 February 2000.

27 Inter-Am.CHR, *Bamaca Velasquez v. Guatemala*, Judgment, Case No. 70, 25 November 2000.

The European system has been less ready to make overt use of IHL, and direct reference to IHL has rarely appeared since *Cyprus v. Turkey*.²⁸ The Court has, however, made use of IHL principles to interpret specific situations without referring to them by name, for instance in its assessment of a Turkish military operation in the *Ergi* case.²⁹

Human rights bodies established through UN Charter mechanisms do not have the same treaty restrictions and are therefore more easily able to refer directly to violations of IHL. This can be seen in the reports on thematic procedures, such as those by the Special Rapporteur on Extrajudicial Executions, and in reports on country-specific procedures when dealing with countries involved in armed conflict, such as those compiled by the Special Rapporteurs on Iraq, the former Yugoslavia, and Sudan.³⁰

As for expertise, the assessment of military operations by human rights bodies with or without direct use of IHL terms can be described as inconsistent.³¹ The primary requisite for membership of a human rights body would be proficiency in human rights law, rather than IHL. This may explain, as well as the mandate issue described above, why some bodies such as the European Court of Human Rights make little direct reference to IHL. Moreover, reliance on IHL in some of the cases might be less attributable to any readiness by the court to use it than to the fact that counsel for the applicants happened to be an IHL expert and made use of it in arguing the case, for instance in the *Ergi* case.

Examples in which IHL principles could perhaps have been differently applied can be found in the *Ozkan*³² and *Isayeva* cases.³³ The former case dealt with deaths, detention and the burning of houses that took place during military operations in south-east Turkey. Although this was a military operation in what could arguably be classified as an armed conflict and could thus qualify for applicability of IHL, the consideration of the case did not include reference to IHL rules. The assessment of violations in terms of damage to homes, for instance, may have been different when viewed through an IHL lens.

The *Isayeva* case dealt with an attack by Russian airplanes on a convoy of vehicles, which resulted in civilians being killed and injured. This incident occurred in the context of what has been regarded as a non-international armed conflict.³⁴ The Russian government contended that the pilots were targeting their missiles at trucks carrying armed men, who had fired at the planes, while according to the applicants and many witnesses, there were no trucks of such a kind and the planes

28 ECHR, *Cyprus v. Turkey*, Cases No. 6780/74 and 6950/75, Report of the Commission, 10 July 1976.

29 ECHR, *Ergi v. Turkey*, Case No. 23818/94, Judgment, 28 July 1998.

30 Examples of these and others are cited in D. O'Donnell, "Trends in the application of international humanitarian law by United Nations human rights mechanisms," *International Review of the Red Cross*, No. 324, September 1998, p. 481.

31 See some of the criticisms raised in the ICRC report on "International humanitarian law and the challenges of contemporary armed conflicts," 28th International Conference of the Red Cross and Red Crescent, ICRC, Geneva, 2003, pp. 59–60.

32 ECHR, *Ozkan and others*, Case No. 21689/93, Judgment, 6 April 2004.

33 *Op. cit.* (note 24).

34 See Sub-Commission Working Paper, *op. cit.* (note 11), para. 72 and accompanying footnote 58.

had not been fired at. The Court states that: “In particular, it is necessary to examine whether the operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimised.”³⁵ This assessment has strong foundations in human rights law, but perhaps is not exactly the same formulation as would be used for military operations in an armed conflict. Risk to innocent civilian life and property must indeed also be minimized in armed conflict, but if the target is a legitimate military one, then lethal force might be the first recourse, at least in some circumstances, provided that risks to people and objects in the vicinity are taken into account. The initial question should arguably have been whether there was a legitimate military objective to be targeted — if there was not, then the use of force against civilians was unlawful, but if there was reason to believe the pilots were firing at a lawful target, then the IHL rules on targeting and use of force would be pertinent. The Court, however, did not seem to make direct use of the IHL rules on military objectives and targeting, although its assessment related to a military operation in the context of an armed conflict.

A possible reason for not using IHL might have been the pervasive notion that apart from Common Article 3 and the few rules of Additional Protocol II, not many relevant rules — including those on military objectives and targeting — are applicable in non-international armed conflict, and that human rights principles are therefore the only ones to be guided by. In this regard the ICRC study on customary law can, like the case-law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) and the Rome Statute, be of assistance to human rights bodies. Whereas these bodies have hitherto relied predominantly on human rights law and in some cases on Common Article 3, this study now provides them with a detailed collection of rules applicable in non-international armed conflict, which can help them to make a proper assessment of the conduct of States in such situations.³⁶ As already mentioned, even if the final pronouncements are limited to human rights law, IHL can and should be used at least as an interpretative aid.

A number of factors may be hindering the use of IHL standards by human rights bodies. They include the conceptual differences between the two legal regimes, as well as particular problems to do with the relationship between human rights law and IHL during non-international armed conflicts. These are the next two challenges to be examined here.

IHL and human rights law as different languages

Anyone who has been involved in teaching IHL to human rights professionals or speaking of human rights law with military personnel is aware of the acute difficulties that at times make it seem like speaking Dutch to the Chinese or vice

35 *Op. cit.* (note 24), para. 171.

36 Though it does not solve all the related problems, as can be seen below in the section on human rights law and IHL during non-international armed conflict.

versa. A military officer schooled in the rules determining whom he has licence to target might find discussion of “a right to life” slightly vexing. A human rights professional is often equally baffled by the definition of a military objective. Communication breakdown in these situations can be rapid.

One of the keys to successfully explaining IHL to persons from the human rights community, or the other way around, can be to describe them as two separate languages. Resorting to legal linguistics is more than just a question of which words one chooses. The difference between languages includes not only words and terms, but encapsulates conceptual differences that can lead to contrasting ways of thinking and differing approaches to situations.

Whilst IHL and human rights law may share certain common concepts, even the shared parts are often differently expressed. Sometimes terms can be translated — for instance, some of the human rights law on the right to privacy and protection from interference with the home — could be translated in a fairly clear-cut manner into IHL rules on destruction or seizure of private property. In other cases the translation is much less straightforward but nevertheless possible — the right to life and prohibition on arbitrary killings in human rights law resemble but are not identical to the IHL prohibition on targeting civilians. With a little explanation (focusing mainly on the difference that under IHL it can be lawful to target an opposing combatant, even if that person is not an immediate threat at the time) translation in this latter case is still feasible.

Other terms, such as “military objective” in IHL parlance, exist only in one language and cannot be properly translated. Such terms must be explained and taught in their native form.

There are also words that sound the same in both languages. “Judicial guarantees” and “the prohibition of torture” not only do sound the same, but share much of their substantive meaning in the two languages.

The greater difficulty arises when the opposite is the case — a term that sounds the same but has different meanings in each of the two languages. “Proportionality” is considered a core principle in both IHL and human rights law.³⁷ In both of them it denotes a balancing relationship: X in relation to Y. In substance, however, it is not always the same and can indeed cause confusion.

For example, under human rights law and the rules of law enforcement, when a State agent is using force against an individual, the proportionality principle measures that force in an assessment that includes the effect on the individual himself, leading to a need to use the smallest amount of force necessary and restricting the use of lethal force.³⁸

Under IHL, on the other hand, if the individual is for instance a combatant who can be lawfully targeted, then the proportionality principle focuses on the

37 J. Delbruck, “Proportionality,” *Encyclopaedia of Public International Law*, Vol. 7, Elsevier Science Publishers, 1984, p. 398.

38 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, UN Doc. A/CONF.144/28/Rev.1, 1990, p. 112; UN Code of Conduct for Law Enforcement Officials, G.A. res. 34/169, annex, 34 UN GAOR Supp. (No. 46), p. 186; UN Doc. A/34/46, 1979; *McCann and Others v. United Kingdom*, 21 Eur. H.R. Rep. 97, paras. 147–149.

effect upon surrounding people and objects, rather than upon the targeted individual, against whom it might be lawful to use lethal force as a first recourse.³⁹

In the latter example, if the human rights law understanding of proportionality were to be used, and if the individual did not pose a direct threat at the given moment, then lethal force might well be considered disproportionate. If, however, there were no other casualties or damage and the individual combatant was the only person affected, then under IHL the proportionality rule is unlikely to have been violated.

Clearly, as mentioned above, this is the type of situation in which the right to life must be understood in the context of the relevant IHL principles, which would constitute *lex specialis*,⁴⁰ but although the person examining the case — including human rights bodies — may correctly turn to IHL principles for guidance, they might nevertheless use proportionality as it is understood in human rights law. Consequently, a misunderstanding of the proportionality concept and the way in which it differs in the two legal regimes can cause confusion when coming to interpret some of these situations.

It is therefore crucial that when applying both human rights law and IHL to a particular case, we bear in mind the differences between the languages and make sure the correct terms and definitions are used, both to increase the level of understanding, and to avoid potential confusion and mistakes. While it is acceptable, and often even necessary, to use both human rights law and IHL in order to assess a situation, it would be wise to clarify which language is being spoken, and not jump between them using terms from the different bodies of law within the same sentence, or perhaps not even in too close proximity to each other.

Human rights law and IHL during non-international armed conflict

One of the main areas of difficulty with regard to joint applicability — that of extraterritorial applicability of human rights obligations — is much less of an obstacle in the case of non-international armed conflicts, where the conflict is taking place within the territory of the State. Asserting the relevance of human rights law to activities occurring domestically might therefore seem more straightforward. In addition, the fact that IHL treaty law dealing with non-international armed conflicts is comparatively sparse also points towards use of human rights law to assist in the regulation of conduct during such conflicts. Indeed, the few existing treaty rules can be compared and likened to non-derogable human rights, and where IHL treaties are silent, human rights law might be offered as an answer.⁴¹

39 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 51.5(b).

40 *Op. cit.* (note 3).

41 L. Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, pp. 193–231; C. Greenwood, “Rights at the frontier: Protecting the individual in time of war,” *Law at the Centre: The Institute of Advanced Legal Studies at Fifty*, Kluwer, Dordrecht, 1999, p. 288.

Recent years have seen much progress in widening the scope of IHL rules applicable to non-international armed conflicts, primarily through customary international law.⁴² The ICTY *Tadic* case and the new ICRC study have determined that under customary international law the IHL rules on international and non-international armed conflicts are in essence much the same, and according to the ICRC study the majority of IHL rules (though not all) apply to both types of conflict.⁴³ The ICC Statute has also been instrumental in this regard.⁴⁴ This development can in many ways be viewed as a great success, enhancing the protection of IHL available to victims of non-international armed conflicts. At the same time, however, the increased number of IHL rules applicable might also indicate a potential increase in the possible clashes with human rights law, which has also developed over the years. The foregoing example of the difference in understanding of the proportionality principle (which did not explicitly appear in the Additional Protocol II rules for non-international armed conflicts, but is cited as a rule of customary IHL⁴⁵), is one such case.

The risk of a clash is heightened when dealing with situations for which the IHL rules remain unclear. The following is a hypothetical example — though it could fit many real situations — that illustrates the problem:

In State X, there have been ongoing violent confrontations between State forces and members of group Y. For the past three years there have been many such confrontations, sometimes four times a week, sometimes once a fortnight, causing each year an average of over 900 deaths among State forces, group members, and civilians not taking part in the clashes, and many more injuries. On a certain date, State military intelligence discovers that members of the group are holding a meeting in a house in a certain village. State forces approach the house and fire an RPG rocket into the meeting room, killing all the group members (and nobody else).

Under human rights law, unless certain other information emerges, e.g. if the State forces went to arrest the group members but came under extremely heavy fire when approaching the house, it is likely to be found that they acted

42 Though there have also been developments in treaty law, such as through the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980, amendment Article 1, 21 December 2001.

43 ICTY, *Prosecutor v. Tadic*, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995, paras.97–98, 117, 119–125. For an assessment of these findings, see C. Greenwood, “International humanitarian law and the *Tadic* case,” *European Journal of International Law*, Vol. 7, 1996, p. 265; ICRC study, *op. cit.* (note. 1). While not every point of the ICRC study may be agreed with, as was seen at some of the conferences devoted to it (indeed, the foreword acknowledges that “the study makes no claim to be the final word,” p. xvii), it is virtually incontestable that one of its major achievements is to have elucidated a great number of IHL rules applicable to non-international armed conflicts.

44 Though more limited than the above sources. Rome Statute of the International Criminal Court (ICC), UN Doc. A/CONF.183/9, 1998, Article 8.2(e).

45 ICRC study, *op. cit.* (note 1), Vol. 1, pp. 46–50.

unlawfully: the soldiers would have been expected to make an attempt to arrest them, initially using less lethal force, if any.⁴⁶

But what of IHL? First, it would be necessary to determine whether this is in fact an armed conflict, since if it is not, IHL would simply not apply. To classify the situation is often one of the more contentious issues with regard to internal violence, and the difficulties of determining whether the threshold of an armed conflict has been reached are well documented.⁴⁷ Even short-term military operations lasting barely a matter of days might sometimes be considered to have crossed the threshold into non-international armed conflict.⁴⁸ Situations such as the above can be argued both ways, and there is no final arbitrator. But even if IHL is found to be applicable, there is still no clear answer as to whether the operation was lawful under IHL. The main conundrum is now the status of the individual members of group Y.

Unlike the IHL rules on international armed conflict, the treaty rules for non-international conflicts make no mention of a legal status of combatants, i.e. of persons who may participate in the hostilities and can be lawfully targeted. Whereas the targeting of civilians is prohibited, it is unclear how to classify members of armed groups and consequently determine when they can be targeted. The differing views on their classification include defining them as non-civilians who may be targeted at all times, similar to combatants in international conflicts; as civilians who have lost their protection due to direct participation and can be targeted for the duration of the conflict, since their very membership of such a group is a form of participation in the hostilities; or as civilians who may lose their protection at certain times during the conflict, but only if and during the time their actual actions (other than general membership of the group) constitute taking a direct part.⁴⁹

If one subscribes to the first and perhaps also the second of these interpretations (although they might seem highly controversial, these views nevertheless do still exist and there is not yet enough consensus for them to be ruled out completely⁵⁰), then lethal force as a first recourse, as in the hypothetical attack on the members of group Y, might not be in violation of IHL rules.

In international armed conflicts, the reasoning behind use of the relevant IHL rules as *lex specialis* when faced with a potential violation of the human

46 See note 39 above. See also discussion of the right to life in C.K. Boyle, “The concept of arbitrary deprivation of life” in B.G. Ramcharan (ed), *The Right to Life in International Law*, Nijhoff, Dordrecht, 1985, pp. 221-244; and in D. Kretzmer “Targeted killing of suspected terrorists: Extra-judicial executions or legitimate means of defence?”, *European Journal of International Law*, Vol. 16, p. 171, pp. 176–183.

47 Moir, *op. cit.* (note 42), pp. 67-88. See also H. Spieker, “Twenty-five years after the adoption of Additional Protocol II: Breakthrough or failure of humanitarian legal protection?”, *Yearbook of International Humanitarian Law*, Vol. 4, T.M.C., Asser Press, The Hague, 2001, pp. 134–143.

48 *Abella v. Argentina*, *op. cit.* (note 26).

49 “While State armed forces are not considered civilians, practice is not clear as to whether members of armed opposition groups are civilians subject to Rule 6 on loss of protection from attack in the event of direct participation or whether members of such groups are liable to attack as such, independently of the operation of Rule 6,” ICRC study, *op. cit.* (note 1), Vol. 1, p. 19 and, in general, pp. 17–24; see also *IHL and the Challenges of Contemporary Armed Conflicts*, *op. cit.* (note 32), pp. 27–39.

50 ICRC study, *ibid.*

rights law obligation to protect the right to life is fairly obvious. A combatant can lawfully target another combatant, and this should not be regarded as an arbitrary or unlawful killing, as it is an inherent and necessary part of military operations and recognized in IHL. While the dividing line between combatant and civilian might not always be one hundred per cent clear in international armed conflicts,⁵¹ it is a distinction that can be maintained at most times. Not so is the situation in non-international armed conflicts, in which this distinction is not as readily visible, neither on the ground nor in the law. Relinquishing the standards of law enforcement and human rights law, in favour of IHL, could lead to greater complications rather than providing a solution.

The risk is that the lack of consensus over determination of threshold, coupled with some of the above views on individual status, could make it easier for States to disregard the standards of human rights law and law enforcement, and adopt shoot-to-kill policies whenever confronted with borderline situations which they might be able to claim amount to an armed conflict.⁵²

Various possible solutions can be put forward, though none of them appear wholly satisfactory. It may be tempting to say that human rights law standards should be the ones to prevail during non-international armed conflicts. This argument is, however, unlikely to get very far — what of those high intensity non-international armed conflicts that to all intents and purposes involve battles and forces similar in scale to those of many international armed conflicts?⁵³ Surely it could not be maintained that a soldier on the battlefield can only fire in individual self-defence?⁵⁴ The long-established IHL rules for these situations cannot be easily reconstructed or even discarded.

A limited version of this solution might be to claim that human rights law standards on the use of force should prevail during domestic operations of a certain low scale, even in the context of a non-international armed conflict, but that once the conflict reaches a second and higher threshold (such as that of Additional Protocol II), IHL rules on the use of force will come into play. This solution in effect raises the threshold for determination of non-international armed conflicts, and flies in the face of efforts to allow for a lower threshold that would bring IHL protections into play as early as possible. Moreover, one

51 The discussion of problems related to direct participation of civilians (*ibid*) also covers international armed conflict.

52 See risk raised by Kretzmer, *op. cit.* (note 47), p. 200; on the question of characterization of the situation, including self-characterization, see Provost, *op. cit.* (note 2), pp. 277–342. It is, however, important to note that historically, States have tended not to accept the classification of armed conflict and deny that the threshold had been reached. See T. Meron, *Human Rights in Internal Strife: Their International Protection*, Grotius, Cambridge, 1987, p. 47, and Moir, *op. cit.* (note 42), pp. 67–88.

53 Such as the Spanish Civil War.

54 Although one view would appear to lead in that direction — see F. F. Martin “Using international human rights law for establishing a unified use of force rule in the law of armed conflict,” *Saskatchewan Law Review*, Vol. 64, 2001, p. 347; but see responses in J. Paust “Colloquy on the law of armed conflict: The unified use of force and exclusionary rules — The right to life in human rights law and the law of war,” and in L.C. Green “Colloquy on the law of armed conflict: The unified use of force and exclusionary rules — The “unified use of force rule” and the law of armed conflict: A reply to Professor Martin,” both in *Saskatchewan Law Review*, Vol. 65, 2002, pp. 411 and 427.

of the reasons to allow for a lower threshold of IHL applicability is to have rules and obligations that would be equally binding for non-State parties to conflict (unlike human rights obligations, which traditionally are seen as directly binding on States alone), and enhance protection from those groups.

The above ideas for solutions amount to limiting the applicability of IHL, thereby risking the creation of impractical situations (by subjecting battlefield circumstances to the stricter rules of law enforcement), and reducing the amount of available protection (e.g. it would be harder to regulate the conduct of non-state groups without applicable IHL obligations); they do not therefore appear to be desirable solutions. A somewhat different approach might be to re-examine the relationship between IHL and human rights law in these situations,⁵⁵ in particular the notion of using IHL as the *lex specialis* on the right to life during non-international armed conflicts.

With this approach, it might be said that during a non-international armed conflict, whenever the State has enough control over a particular situation to enable it to attempt to detain individuals, then such an attempt must be made before force can be used, and non-lethal force must be favoured if possible. This argument seems to allow for retention of the standard law enforcement and human rights law approach without creating impractical situations. However, the legal basis under IHL for making such a claim is unclear. If the context of the operation is an existing armed conflict and IHL is therefore applicable, then at least according to certain interpretations of IHL rules, members of armed opposition groups might, as seen above, be subjected to lethal force without a prior attempt to arrest them. Furthermore, what would then prevent this claim from also being made with regard to international armed conflicts? States are unlikely to accept that they must attempt to detain opposing combatants before using lethal force.

Despite these evident difficulties, it is submitted here that an approach based on the assertion that in situations such as our earlier example, an attempt to detain should be made before lethal force can be used, could indeed be advocated. However, the above-mentioned obstacles must first be addressed for it to be practicable and not conflict with existing IHL rules. The IHL and human rights law relationship in this situation is unclear, largely due to lack of clarity within IHL itself.⁵⁶ The way forward here may well have to be through progress in the debate on the status of individuals during non-international armed conflicts, the issue of the direct participation of civilians in hostilities, and the consequences of losing protection.

55 See for instance the “Mixed Model” proposed by Kretzmer with regard to terrorism, *op. cit.* (note 47), pp. 201–204.

56 While there has been much progress in development of IHL in relation to non-international armed conflict, comments concerning the status of individuals made over 30 years ago remain pertinent: “international law can responsibly order internal conflict only if it, first, provides uniform rules for the conduct of military operations therein and, second, provides rules for the classification and treatment of non-combatants.” J. Bond, *The Rules of Riot: Internal Conflict and the Law of War*, Princeton University Press, Princeton, 1974, p.137.

Economic, social and cultural rights during armed conflict

The final challenge to be raised in this article concerns a very different issue, that of a set of rights that does not always receive equal attention. Discussion of the relationship between human rights law and IHL tends to focus on civil and political rights, in particular those dealing with use of force and deprivation of liberty. But human rights law is far richer than those two topics in particular, or even than the whole realm of civil and political rights in general. While there may be certain conceptual or procedural differences between them, the set of rights known as economic, social and cultural rights (ESC rights) are equal members of the human rights family. What do we know of their relationship with IHL?

If human rights law applies during armed conflict, then it can be assumed, unless otherwise stated, that this holds true for the whole body of human rights law and does not exclude ESC rights. Nor are they directly excluded in any way. On the contrary, the International Court of Justice has affirmed the applicability of ESC rights obligations in a situation to which IHL is applicable,⁵⁷ so outright dismissal of those rights whenever IHL comes into play is not a tenable position. The ICJ Advisory Opinion thus provided further support to the already existing views of the UN Committee on Economic, Social and Cultural Rights on their applicability.⁵⁸

ESC rights include, among other things, education, health, social security, food and employment. A number of the ESC rights deal with issues that are in no way strangers to IHL. Ensuring adequate food supplies, and even more so protecting health during armed conflict, are clearly a part of the IHL rules and have been the subject of various specialized publications.⁵⁹ But when dealing with these issues the approach is not usually based on the human rights point of view, and the focus of attention is placed on the relevant IHL rules (e.g. rules on protection of medical facilities), and the non-legal practical questions of how to work on the ground (e.g. what should be done to prevent public health hazards).⁶⁰ One reason could be that IHL rules might seem at first glance to contain far greater detail than the treaty rules of human rights obligations. But this ignores the extensive detail on ESC rights that can be found outside the treaty wording, for instance in the work of the UN Committee on Economic, Social and Cultural Rights — the General Comment on the right to health, for example, goes into lengthy and intricate details, providing an understanding of health needs and obligations that goes far beyond the IHL provisions.⁶¹

57 ICJ Adv. Op., *op. cit.* (note 4), paras. 107–112.

58 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 31/08/2001. E/C.12/1/Add.69.

59 Jelena Pejić, “The right to food in situations of armed conflict: The legal framework,” *International Review of the Red Cross*, Vol. 83, No. 844, December 2001, p. 1097; P. Perrin (ed.) *Handbook on War and Public Health*, ICRC, Geneva, 1996; I. Taipale (ed.), *War or Health: A Reader*, Zed Books, London, 2002.

60 *Ibid.*

61 Committee on Economic, Social and Cultural Rights, General Comment 14, The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4 (2000).

A number of difficulties, some of which are less of a challenge in the case of civil and political rights, can be identified with regard to ESC rights during armed conflict. The common approach when dealing with civil and political rights is to speak of the possibility of derogation from human rights obligations in accordance with the specific clauses on derogation, as well as turning to IHL as the *lex specialis*. The International Covenant on Economic, Social and Cultural Rights, however, does not have an equivalent derogation article. The closest the Covenant comes to this is in Article 4: "...the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." Either some creative interpretation is required in order to view this article as allowing for restrictions during armed conflict (though this would still not be equal to the formal procedure of derogation as it appears in the Covenant on Civil and Political Rights), or there is no clear allowance for derogation or restriction in such times. As for the *lex specialis*, some of the human rights law obligations cover topics which are scarcely if at all mentioned in IHL (e.g. social security), or include specific details on the content of the obligations that are not found in IHL (e.g. as can be found in the General Comment on the right to health⁶²). If human rights law is the body of law containing greater detail and regulating a certain matter, then the ICJ formulation⁶³ might be understood to mean that the human rights law obligations would remain of primary relevance.

To examine this further, what would the obligations be, for instance, of an occupying power towards the inhabitants of the occupied territory in terms of the right to health? As noted earlier,⁶⁴ it would seem that human rights law obligations, including ESC rights, do apply to occupied territories. The need for these rights can be even more acute when dealing with prolonged occupation spanning decades.⁶⁵ It might not, however, be practicable to apply the same standards and obligations to the occupied territory as those expected with regard to the right to health in the State's own territory, besides being debatable whether this is required by law. A three-tiered approach is sometimes used when analysing the human rights obligations of a State to "respect, protect, and fulfil."⁶⁶ While the existing IHL rules may cover many of the "respect" and "protect" aspects of the right to health (e.g. protection of medical facilities), the "fulfil" aspect is not as clear. Under IHL, aliens in the territory of a party to a conflict are generally entitled to the same level of health care as is provided to the State's own nationals.⁶⁷ There is no equivalent IHL obligation concerning

62 *Ibid.*

63 See note 5 above.

64 Confirmed both by human rights bodies and by the ICJ, see notes 3, 4, 5, 11, 12, 13 and 59 above.

65 A. Roberts, "Prolonged military occupation: The Israeli-occupied territories 1967-1988," *American Journal of International Law*, Vol. 84, 1990, p. 71.

66 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22–26 January 1997, para. 6.

67 Article 38 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

inhabitants of an occupied territory. But if the human right to health is considered to be equally applicable in the State's own territory and in the occupied territory, then it might be argued that the inhabitants of the latter are entitled to the same health care as the State provides for its own nationals. Yet occupation is envisaged as a temporary situation, and although the Fourth Geneva Convention allows for the adoption of health measures,⁶⁸ the ability of the occupying power to establish an elaborate health system can be restricted in practical terms. Also, should the occupying power be able to provide a higher standard of health care than was previously available, then ending the occupation could potentially amount to a problematic regressive measure that would cause the health situation to deteriorate by reverting to the responsibilities of a sovereign State unable to provide the same level of care.⁶⁹

The case for equal or almost equal health care might arguably be viable when dealing with prolonged occupation, especially if the occupying power is providing a high level of health care to its own citizens residing in the occupied territory.⁷⁰ In general, however, when it comes to implementing ESC human rights obligations in situations to which IHL is applicable, for instance in occupied territory, there are obviously difficulties as regards derogation and level of fulfilment which need to be addressed.

Conclusion

Once we have moved beyond the question of actual applicability of human rights law to situations of armed conflict, a number of challenges still remain. In some areas the joint applicability works well and the two bodies of law favourably reinforce each other. However, the relationship is still evolving. Some issues, such as extraterritorial applicability, are already the subject of discussion and will likely remain debatable for a while. Other challenges and difficulties require extensive further attention.

When dealing with situations of armed conflict, human rights bodies must become well-versed in the basics of IHL — and vice versa — and when necessary use these principles as an interpretative tool. As of now, the use of IHL by human rights bodies can be improved. Awareness of the “linguistic” differences in use of terms and concepts can be helpful. When applying both bodies of law, care must be taken in the choice of terms, remembering that although IHL and human rights law may share many goals, they remain separate creatures.

The difficulties and risks encountered in non-international armed conflict call for further examination and perhaps for new approaches, and progress

68 *Ibid.*, Article 56.

69 There is a presumption against taking retrogressive measures, *op. cit.* (note 62), para. 32.

70 For more on this see the present author's chapter in *Legacy of Injustice*, Physicians for Human Rights, Israel, November 2002.

here will be linked to the ongoing debates on individual status under IHL during such conflicts. Economic, social and cultural rights raise additional challenges concerning applicability of human rights law in times of armed conflict.

To sum up, while it has become increasingly clear that human rights law does apply during armed conflict, significant attention must be turned to these and other challenges and obstacles encountered in the joint application of the two bodies of law.