Click on "CHAPTER BIBLIOGRAPHY" or "SPECIFIC BIBLIOGRAPHY" to see content

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Introductory text

International humanitarian law (IHL) developed as the law of international armed conflicts and was therefore necessarily international law in the traditional sense, an objective legal order governing inter-State relations. Its main objective was always to protect individuals, but that protection was not expressed in the form of subjective rights of the victims; rather, it was a consequence of the rules of behaviour for States and (through them) of individuals.

Human rights have only recently been protected by international law and are still today mainly protected by national law (though not of exclusively domestic concern). They were always seen and formulated as

subjective rights of the individual and of groups in respect of the State – mainly their own State.

Both branches of international law are today largely codified. IHL, however, is codified in a broadly coherent international system of binding universal instruments of which the more recent or specific clarify their relationship with the older or more general treaties. International Human Rights Law, conversely, is codified in an impressive number of instruments – universal or regional, binding or exhortatory, concerning the whole subject, its implementation only, specific rights or their implementation only – that emerge, develop, are implemented and die in a relatively natural, uncoordinated way.

Because of the philosophical axiom driving them, human rights apply to everyone everywhere, and as they are concerned with all aspects of human life, they have a much greater impact on public opinion and international politics than IHL, which is applicable only in armed conflicts that are themselves to be avoided. IHL is therefore increasingly influenced by human rights-like thinking.

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I. Fields of application

CASES AND DOCUMENTS

- Colombia/Displacement of Civilians
- ECHR, Cyprus v. Turkey
- Inter-American Commission on Human Right, Tablada [Paras 158 and 159]
- Colombia, Constitutional Conformity of Protocol II (Paras 11 and 12)
- ECHR, Al-Jedda v. UK
- United States of America, Military Commissions Trial Judiciary, Guantanamo Bay, Cuba: United States of America v. Khalid Shaikh Mohammad et al.
- Mexico, Recapture of Ovidio Guzmán, One of the Leaders of the Sinaloa Cartel
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1. Material fields of application: complementarity

Introductory text

IHL is applicable in armed conflicts only. International Human Rights Law is applicable in all situations. All but the non-derogable provisions, the “hard core” of International Human Rights Law, however, may be suspended, under certain conditions, in situations threatening the life of the nation. As those situations do not only include armed conflicts (see however below, b. aa)), which trigger IHL's applicability, the complementarity remains imperfect; in particular, a gap exists in situations of internal disturbances and tension in which IHL does not apply.

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a. IHL is applicable in armed conflicts

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b. Human rights apply at all times

Quotation

General Comment No. 31 [80]

The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. Adopted on 29 March 2004 (2187th meeting)
[...]

11. As implied in [...] General Comment No. 29 on States of Emergencies, adopted on 24 July 2001, reproduced in Annual Report for 2001, A/56/40, Annex VI, paragraph 3, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

[**Source**: General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004. Human Rights Committee. Eightieth session (CCPR/C/74/CRP.4/Rev.6.), online: http://docstore.ohchr.org/SelfServices]

CASES AND DOCUMENTS

- ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., paras 101-106 and 127-130]
- Israel, Human Rights Committee's Report on Beit Hanoun [Paras 50-80]
- Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 143]
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aa) but derogations possible in situations threatening the life of the nation

International armed conflicts normally threaten the life of States parties and non-international armed conflicts threaten the life of the State on the territory of which they occur. There are however controversies regarding the need and possibility to derogate for a State involved in an non-international armed conflict outside its own territory. In our view, if a State is bound by human rights on the territory of another State, it must also be able to derogate based upon the situation in that territory.

CASES AND DOCUMENTS

- Colombia, Response of armed groups to COVID-19
- UN, Minimum Humanitarian Standards [Part B., paras 50-57]
- Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 149-153]
- ECHR, Hassan v. UK
- UK, The Case of Serdar Mohammed (High Court Judgment) [Para 155]

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bb) no derogations from the “hard core” – but controversy whether and to what extent judicial guarantees belong to the “hard core”

Quotation

General Comment No. 35

65. Article 9 is not included in the list of non-derogable rights of article 4, paragraph 2, of the Covenant, but there are limits on States parties’ power to derogate. […]

66. […] The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances. The existence and nature of a public emergency which threatens the life of the nation may, however, be relevant to a determination of whether a particular arrest or detention is arbitrary. […] During international armed conflict, substantive and procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention. Outside that context, the requirements of strict necessity and proportionality constrain any derogating measures involving security detention, which must be limited in duration and accompanied by procedures to prevent arbitrary application […].

67. The procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. In order to protect non-derogable rights, including those in articles 6 and 7, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation.

[**Source**: General Comment No. 35, Article 9 of the International Covenant on Civil and Political Rights (Liberty and Security of Person): 23/10/2014.Human Rights Committee.112th session (CCPR/C/GC/35) online https://tbinternet.ohchr.org.]

CASES AND DOCUMENTS

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cc) police operations remain at all times governed by the specific International Human Rights standards applicable to police operations against civilians, which may never be conducted like hostilities against combatants

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- Israel, The Rafah Case
- Iraq, Use of Force by United States Forces in Occupied Iraq
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a. **gap in situations of internal disturbances and tensions**
(For a definition of internal disturbances and tensions, see supra Part I, Chapter 2.III.1.C) Other situations

CASES AND DOCUMENTS

- ICRC, Disintegration of State Structures
- Minimum Humanitarian Standards
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2. Protected persons

Introductory text

While it is an important rule of International Human Rights Law that all human beings benefit equally from these rights, the traditional approach of IHL, consistent with its development as inter-State law, is essentially to protect enemies. IHL therefore defines a category of “protected persons”, consisting basically of enemy nationals, who enjoy comprehensive protections. Nevertheless, victims of armed conflicts who do not fall under the legal category of “protected persons” do not completely lack protection. In conformity with and under the influence of International Human Rights Law, al persons affected by armed conflicts benefit from a set of protective rules, which, however, never offer the full protection foreseen for “protected persons”.

CASES AND DOCUMENTS

- ECHR, Bankovic and Others v. Belgium and 16 Other States
- ECHR, Al-Jedda v. UK

a. **International Humanitarian Law: concept of protected persons**
(See supra, Part I, Chapter 2. III. 2. a) passive personal scope of application: who is protected?)

b. **International Human Rights Law: all human beings**

CASES AND DOCUMENTS

- ECHR, Bankovic and Others v. Belgium and 16 Other States

aa) who are on the territory and/or under the jurisdiction of a State: controversy about the extraterritorial application of International Human Rights Law

CASES AND DOCUMENTS

- ECHR, Bankovic and Others v. Belgium and 16 Other States
- United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments)

3. Relations affected

Introductory text

International Human Rights Law prescribes (or recognizes) that individuals (or groups) have rights in respect of their State (or, arguably, other authorities). The provisions of IHL, too, protect individuals against the (traditionally enemy) State or other belligerent authorities. IHL, however, also corresponds to the traditional structure of international law in that it governs (often by the very same provisions) relations between States. In addition, it prescribes rules of behaviour for individuals for the benefit of other individuals. This is untrontroversial for those also referred to in international criminal law as war crimes, while the legal basis for this widely held opinion is unclear for most other rules of IHL. [1]

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CASES AND DOCUMENTS

- ICRC, Disintegration of State Structures

a. **International Humanitarian Law**
   - individual – State
   - State – State
   - individual – individual

b. **International Human Rights Law**
   - individual – State

CASES AND DOCUMENTS

- Minimum Humanitarian Standards (Part B., paras 59-64)
- ECHR, Bankovic and Others v. Belgium and 16 Other States

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4. The geographical scope of application: the extraterritorial application of International Human Rights Law

Introductory text

No one disputes that a State has to comply with IHL when it fights outside its territory. The IHL of military occupation has even been specifically made for such situations. Some rules of IHL (e.g., on the protection of prisoners of war and protected civilians) protect only those who are in the power of a State, while other rules (such as those on the conduct of hostilities) protect everyone, including, for example, the civilian population of the adverse party, against indiscriminate attacks or enemy soldiers against acts of perfidy or the use of prohibited weapons. The territorial field of application of International Human Rights Law raises many more controversies.

Most regional human rights conventions clearly state that the States Parties must secure the rights listed in those conventions for everyone within their jurisdiction. This includes occupied territory. On the universal level, under the International Covenant on Civil and Political Rights a Party undertakes ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized…’ (our emphasis). This wording and the negotiating history lean towards understanding territory and jurisdiction as cumulative conditions. Several States therefore deny that the Covenant is applicable extraterritorially. The International Court of Justice, the United Nations Human Rights Committee and other States are, however, of the opinion that the Covenant applies equally in occupied territory. From a teleological point of view, it would indeed be astonishing that persons whose rights can neither be violated nor protected by the territorial State lose all protection of their fundamental rights in respect of the State which can actually violate and protect their rights.

Even if International Human Rights Law applies extraterritorially, the next key question that arises is when a person can be considered to be under the jurisdiction of a State. Today, it is suggested by human rights bodies that, in addition to territorial control, control over persons (for instance persons detained by a State's agents) is also sufficient to trigger jurisdiction. Some even suggest that the obligation to respect – but not necessarily to protect and to fulfil – human rights already applies as soon as a person’s right can be affected by a State’s conduct (e.g. through an aerial bombardment). One solution to this question lies in the functional approach, which distinguishes the degree of control necessary according to the right to be protected. Such a “sliding scale” approach would reconcile the object and purpose of human rights – to protect everyone – with the need not to bind States by guarantees they cannot deliver outside their territory and concern to protect the sovereignty of the territorial State (which may be encroached upon by international forces protecting human rights against anyone other than themselves).

Quotation

General Comment No. 31

3. Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction […].

[…]

10. States Parties are required by article 2, paragraph 1, 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. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. [...] the 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, such as asylum seekers, refugees, migrant workers and other persons, 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.

[Source: General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26/05/2004. Human Rights Committee, 80th session (CCPR/C/21/Rev.1/Add.13) online https://tbinternet.ohchr.org]

Quotation

General Comment No. 36

63. In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner. States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life. Furthermore, States parties must respect and protect the lives of individuals located in places, which are under their effective

control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant. States parties are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea. Given that the deprivation of liberty brings a person within a State's effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory.

[Source: General Comment No. 36, Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life: 30/10/2018. Human Rights Committee. 124th Session (CCPR/C/GC/36), online https://tbinternet.ohchr.org.]

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5. Are armed groups bound by International Human Rights Law?

In contrast to IHL of non-international armed conflicts, which addresses non-State armed groups in addition to States, it is controversial whether non-State armed groups also have obligations under International Human Rights Law (IHRL). Traditionally, only very few scholars advocated that entities other than States had IHRL obligations. While this claim remains a minority view, it has gained traction in recent years, including for non-State armed groups. It is also reflected in the changing terminology employed by international organs, which previously referred to human rights 'abuses' committed by such groups but now increasingly refer to human rights 'violations'.

However, when non-State armed groups have IHRL obligations is not very clear. The practice of certain international bodies suggests that such groups must comply with IHRL when they are *de facto* authorities due to their control of territory and the governmental functions they exercise therein. Shrouded in similar uncertainty is the question of exactly which IHRL norms may bind non-State armed groups. In any case, many of those norms must be reformulated to become meaningful for armed groups. Under one view, a group's IHRL obligations increase with the level of territorial control or governmental functions it exercises. Understandably, it is easier for States to accept that armed groups may be bound by 'negative' obligations to refrain from particular conduct (for example, from recruiting children into their armed forces) than by 'positive' obligations (for instance, the provision of education and healthcare in territories under their control) as they view the latter as functions that properly belong only to government. However, positive IHRL obligations of non-State armed groups controlling territory would be particularly important for inhabitants of such territory because IHL of non-international armed conflicts – as opposed to IHL of international armed conflicts governing military occupation – fails to provide any rules on what measures a non-State armed group must take to administer a territory, legislate or maintain law and order. Nor does IHL of non-international armed conflicts cover everyday rights of persons living under control of a non-State armed group on issues that lack the requisite nexus to the armed conflict.

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FOOTNOTES

- [1] See, however, Art. 18 (2) of Convention I: "The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence."

II. Protected rights

Introductory text

If the protective rules of IHL are translated into rights and these rights compared with those provided by International Human Rights Law, it becomes apparent that IHL protects, in armed conflicts, only some human rights, [2] namely those that:

a. are particularly endangered by armed conflicts [3] and
b. are not, as such, incompatible with the very nature of armed conflicts. [4]

These few rights are protected by much more detailed IHL regulations that are better adapted to the specific problems arising in armed conflicts than the broad guarantees formulated in International Human Rights Law. [5] In addition, IHL regulates problems of vital import for the protection of victims of armed conflicts, but which International Human Rights Law fails to address, even implicitly. [6]

IHL protects civil and political rights, [7] economic, social and cultural rights, [8] and collective or group rights. [9] Indeed, ever since it was first codified, IHL has never made the artificial distinction between civil and political rights and economic, social and cultural rights or between rights imposing a positive obligation on the State and those requiring the State to abstain from a certain type of behaviour. [10] In all those fields IHL foresees legal obligations. For instance, in armed conflicts there is no meaningful protection without the provision of humanitarian assistance to those in need. Conversely, there can be no humanitarian assistance without a simultaneous concern for protecting those assisted from abuse and against violence and danger, which may even stem from the assistance provided.

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1. Rights protected by both branches: the lex specialis

Introductory text

When a point is covered by both IHL and International Human Rights Law, most of the provisions of both branches are complementary. On some issues however, such as the use of force and admissible grounds and relevant procedure of internment, the applicable rules of the two branches lead to different results. Then, the question arises as to which provision prevails. The maxim of lex specialis is still generally solicited to solve the problem, although the maxim itself is today surrounded by much controversy regarding its meaning and the way to apply it or even objections against its very applicability.

Having said this, in most cases, the two applicable rules do not contradict each other, but one or the other simply provides more details and therefore constitutes the so-called lex specialis. Where contradictions exist between two rules, some argue that IHL provisions always prevail, in every situation for which IHL has a rule or even through its allegedly qualified silence (e.g. by not referring to the freedom of press in the law of military occupation). Others, adopting an International Human Rights Law approach, argue that in any circumstance the rule providing the greatest level of protection must be applied. In our view, it is preferable to adopt a case-by-case approach and to apply the more detailed rule, that is, that which is more precise vis-à-vis the situation and the problem to be addressed, be it the rule emanating from IHL or from International Human Rights Law.

The lex specialis determines for each individual situation which rule prevails over another. Each case must be analysed individually. Specialty in the logical sense implies that the norm that applies to certain facts must give way to the norm that applies to those same facts as well as to an additional fact present in the given situation. Between two applicable rules, the one which has the larger common contact surface area with the situation applies. It is the norm with the more precise or narrower material and/or personal scope of application that prevails. Precision requires that the norm addressing a problem explicitly prevails over the one that treats it implicitly, the one providing more details over the one that is more general, and the more restrictive norm over the one covering the entire problem but in a less exacting manner.

A less formal – and also less objective – factor in determining which of two rules applies is the conformity of the solution to the systemic objectives of the law. Characterizing this solution as lex specialis perhaps constitutes a misuse of language. The systemic order of international law is a normative postulate founded on value judgements. In particular, when formal standards do not indicate a clear result, this teleological criterion must weigh in, even though it allows for personal preferences.

While the lex specialis has been the object of much discussion concerning IHL and international human rights law in recent years, this should not over-emphasize the differences between IHL and International Human Rights Law. As stated above, the aim of and the conduct or result required by both branches is identical on most issues.

The alternative to the lex specialis maxim is to proceed to systemic integration, i.e. to interpret each of the

apparently conflicting rules in light of the other one [footnote: see Art. 31 (3)(c) of the Vienna Convention on the Law of Treaties]. This approach leads in most cases to the same results as an application of the lex specialis maxim. Thus, when International Human Rights Law requires that any deprivation of life must be non-arbitrary, we may simply turn to IHL to determine what arbitrariness means in the conduct of hostilities during an armed conflict. However, systemic integration may also raise some very practical questions. For instance, when International Human Rights Law requires that any deprivation of liberty must be non-arbitrary and based on a legal basis providing the grounds and procedures according to which liberty may be restricted, the question becomes of whether IHL may provide such legal basis, and the consequences under human rights law if it does not.

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b. **areas in which details provided by IHL are more adapted to armed conflicts**

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- Colombia, Special Jurisdiction for Peace, Extrajudicial Executions in Casanare

aa) right to life in the conduct of hostilities

Quotation

General Comment No. 36

64. Like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities. While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive. Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields, would also violate article 6 of the Covenant. States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered. They must also investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards.

65. States parties engaged in the deployment, use, sale or purchase of existing weapons and in the study, development, acquisition or adoption of weapons, and means or methods of warfare, must always consider their impact on the right to life. For example, the development of autonomous weapon systems lacking in human compassion and judgement raises difficult legal and ethical questions concerning the right to life, including questions relating to legal responsibility for their use. The Committee is therefore of the view that such weapon systems should not be developed and put into operation, either in times of war or in times of peace, unless it has been established that their use conforms with article 6 and other relevant norms of international law.

[Source: General Comment No. 36, Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life: 30/10/2018. Human Rights Committee. 124th Session (CCPR/C/GC/36), online https://tbinternet.ohchr.org]

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gg) persons with disabilities

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aa) the right to life of fighters in non-international armed conflict

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bb) legal basis and procedural requirements in case of arrest and detention of fighters in non-international armed conflict

Quotation

General Comment No. 35

45. Paragraph 4 entitles the individual to take proceedings before “a court,” which should ordinarily be a court within the judiciary. Exceptionally, for some forms of detention, legislation may provide for proceedings before a specialized tribunal, which must be established by law and must either be independent of the executive and legislative branches or enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.

[…]

64. […] Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary. In conflict situations, access by the International Committee of the Red Cross to all places of detention becomes an essential additional safeguard for the rights to liberty and security of person.

65. Article 9 is not included in the list of non-derogable rights of article 4, paragraph 2, of the Covenant,

but there are limits on States parties' power to derogate. […]

66. […] The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances. The existence and nature of a public emergency which threatens the life of the nation may, however, be relevant to a determination of whether a particular arrest or detention is arbitrary. […] During international armed conflict, substantive and procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention. Outside that context, the requirements of strict necessity and proportionality constrain any derogating measures involving security detention, which must be limited in duration and accompanied by procedures to prevent arbitrary application, as explained in paragraph15 above, including review by a court within the meaning of paragraph 45 above.

[Source: Genera Comment No. 35, Article 9 of the International Covenant on Civil and Political Rights (Liberty and Security of Person): 23/10/2014.Human Rights Committee.112th session (CCPR/C/GC/35) online https://tbinternet.ohchr.org]

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FOOTNOTES

- [2] Thus, for example, Art. 41 of Protocol I protects the right to life of enemies hors de combat, Art. 56 of Convention IV protects the right to health of inhabitants of occupied territories, Art. 56 of Protocol I protects the right to a healthy environment.
- [3] Thus, e.g., since an armed conflict more strongly affects the war victims’ physical integrity than their freedom of opinion, it is logical that IHL contains more rules on the former than on the latter.
- [4] The right of a people to peace, e.g., is by definition violated when that people is affected by an armed conflict. The right to self-determination is one of the (lawful) reasons for armed conflict. IHL, therefore, can not protect either of these rights.
- [5] Thus, e.g., the very detailed precautionary measures to be taken in attack, according to Art. 57 of Protocol I, constitute a translation of the right to life and physical integrity of civilians into detailed rules of behaviour for those who conduct hostilities which could affect the civilians. Note, however, that International Human Rights Law provides conversely more details on, e.g., “the judicial guarantees which are recognized as indispensable by civilized peoples” foreseen in Art. 3 common to the Conventions.
- [6] Thus, Art. 44(1)-(3) of Protocol I on combatant status deals with the question who may use force, an issue not addressed by International Human Rights Law, but which is crucial for the protection of civilians.
- [7] Thus, e.g., Art. 41 of Protocol I protects the right to life of enemies hors de combat.
- [8] Thus, e.g., Art. 56 of Convention IV protects the right to health of inhabitants of occupied territories.
- [9] Thus, e.g., Art. 56 of Protocol I protects the right to a healthy environment.
- [10] Thus, the very idea of Henry Dunant codified in the First Geneva Convention of 1864 is to prescribe an international obligation that the wounded and sick shall not only be respected but also, and in particular, be collected and cared for.

III. Implementation

Introductory text

While the purpose of both IHL and International Human Rights Law (IHRL) is to obtain respect for the

individual, each of these branches of law has its own implementation approaches and specific mechanisms, tailored to the typical situations for which they were created. Violations of IHL typically occur on the battlefield. They can only be addressed by immediate reaction. International Human Rights Law is more often violated through judicial, administrative or legislative decisions or inaction against which appeal and review procedures are appropriate and meaningful remedies. In the implementation of IHL, the recovery or the improvement of the situation of the victims is central, and therefore a confidential, cooperative and pragmatic approach is often more appropriate. In contrast, the victims of traditional violations of International Human Rights Law want their rights to be reaffirmed, and therefore seek public condemnation as soon as they spot violations. A more legalistic and dogmatic approach is therefore necessary in implementing International Human Rights Law; indeed, such an approach corresponds to the human rights logic, which historically represents a challenge to the “sovereign”, while respect for IHL can be considered as a treatment conceded by the “sovereign”.

It has been said in some quarters that implementation of IHL requires the mentality of a good Samaritan, implementation of International Human Rights Law the mentality of a judge. In practice, IHL has traditionally been implemented through permanent, preventive and corrective scrutiny in the field, whereas International Human Rights Law has traditionally been implemented through a posteriori control, on demand, in a quasi-judicial procedure.

Interestingly, today the different bodies implementing International Human Rights Law in situations of gross and widespread human rights violations in the field act in a way akin to that traditionally adopted by the International Committee of the Red Cross (ICRC) for the implementation of IHL. United Nations (UN) human rights monitors are deployed in critical regions and visit prisons similarly to ICRC delegates, and special rapporteurs of the UN Human Rights Council and even members of UN Human Rights treaty bodies travel to critical areas. On the other hand, IHL is more and more often implemented by human rights courts and bodies (and by international criminal tribunals), necessarily a posteriori and in a judicial procedure.

Indeed, as States reject new international mechanisms to deal with IHL violations, victims, NGOs and States take a bypass route and turn to the variety of IHRL mechanisms – some of which lead to binding decisions and can be triggered by individual victims of IHRL violations. Human rights bodies therefore have plenty of opportunities to address IHL issues. Albeit to a differing extent, such mechanisms do indeed take IHL into account. The mandates of some human rights mechanisms even provide them with the authority to deal equally with IHL violations. While doing so, such bodies sometimes neglect the specificities of IHL and armed conflicts and the debates in some of them are politicized and dominated by double standards. Because there are fundamental differences in the structure, approach and values between IHL and International Human Rights Law, judges and members of other Human Rights bodies often lack sufficient familiarity with IHL and the reality of armed conflicts to fully understand the practical problems its implementation raises, particularly from a military perspective. Therefore, decisions by IHRL bodies that take IHL into account may contribute as much to the substantive fragmentation of international law as decisions that continue to exclusively apply

IHRL in situations of armed conflict. This also may lead to unrealistic findings and generate skepticism, if not hostility, towards such human rights bodies. In addition, the jurisdiction of such bodies in NIACs is generally limited to violations committed by the governmental side.

In international practice, discussions and resolutions of the UN Security Council, the UN General Assembly and the UN Human Rights Council concerning armed conflict situations sometimes mention IHL and human rights together. Certain convergences are also inherent in international human rights instruments. Most human rights, except the most fundamental ones belonging to "the hard core", may be derogated from in states of emergency, to the extent required by the exigencies of the situation, and if this derogation is consistent with the other international obligations of the derogating State. [11] IHL contains some of those other international obligations. Therefore, when confronted in times of armed conflict with derogations admissible as such under human rights instruments, the implementing bodies of International Human Rights Law must check whether those measures are compatible with International Law which encompasses IHL.

Similarly, International Human Rights Law considers the right to life as non-derogable, even in time of armed conflict. Some instruments, however, set out an explicit – and others an implicit – exception for "lawful acts of war". [12] IHL defines what is lawful in war. When confronted with State-sponsored killings in time of armed conflict, human rights courts, commissions or NGOs must therefore check whether such actions are consistent with IHL before they can know whether they violate International Human Rights Law.

Finally, whether a deprivation of the right to life or of liberty is arbitrary and therefore contrary to the provisions of some human rights instruments must be decided in light of the pertinent rules of IHL.

Conversely, the main international body implementing IHL, the ICRC, has for a long time been engaged in activities in situations of internal violence similar to those it performs in international armed conflicts. During such situations, IHL does not apply. In the past implicitly and today more and more ofen explicitly – but maintaining its pragmatic, cooperative, and victim-oriented approach – the ICRC must therefore refer to human rights instruments for applicable international standards, for example on procedural principles and safeguards for internment or administrative detention in non-international armed conflicts.

Finally, as far as the teaching, training and dissemination of the two branches are concerned, soldiers must know Human Rights Law, or at least senior officers must know it in order to translate their provisions into proper rules of engagement. Indeed, more and more soldiers are deployed in peacetime or in times of armed conflict for law enforcement or police operations to which Human Rights Law applies. As for police forces they have to be familiar with both branches and know the relationship between them. Finally, students will not understand new developments in IHL, in particular the important "human rights-like" rules of the law of non-international armed conflicts, if they have not first understood the philosophy and interpretations of International Human Rights Law. Conversely, they would have an incomplete view of the protection international law can offer to the individual if they studied only Human Rights Law without understanding the principles and fundamentally different starting point of IHL, namely the rules providing for protection of the

individual in the most dangerous situations: armed conflicts.

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a. **due to the specificities of armed conflicts**
b. **in the approach: charity vs. justice ?**

Quotation

[T]he ICRC abstains from making public pronouncements about specific acts committed in violation of law and humanity and attributed to belligerents. It is obvious that insofar as it set itself up as a judge, the ICRC would be abandoning the neutrality it has voluntarily assumed. Furthermore, in the quest for a result which would most of the time be illusory, demonstrations of this sort would compromise the charitable activity which the ICRC is in a position to carry out. One cannot be at one and the same time the champion of justice and of charity. One must choose, and the ICRC has long since chosen to be a defender of charity.

[**Source**: Pictet, J., The Fundamental Principles of the Red Cross. Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965, Geneva, Henry Dunant Institute, 1979, pp. 59-60]

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aa) traditionally

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aa) through clauses in human rights treaties

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Quotation

General Comment No. 29: States of Emergency (article 4), 31/08/2001.
[...]

1. Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party’s other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State’s other international obligations, whether based on treaty or general international law. This is reflected also in article 5, paragraph 2, of the Covenant according to which there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.
2. Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party’s other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant. Therefore, when invoking article 4, paragraph 1, or when reporting under article 40 on the legal framework related to emergencies, States parties should present information on their other international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency. In this respect, States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations.

[**Source**: International Covenant on Civil and Political Rights, Document CCPR/C/21/Rev.1/Add.11, of

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- the prohibition of “arbitrary” detention

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- Inter-American Commission on Human Rights, Coard v. United States
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bb) indirectly, through the implementation of International Human Rights Law

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- GASSER Hans-Peter, “A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct”, in *IRRC*, No. 262, 1988, pp. 33-58.

- in armed conflicts
- outside armed conflicts

c. **implementation of IHL and IHRL by domestic courts**

CASES AND DOCUMENTS

- Colombia, Special Jurisdiction for Peace, Extrajudicial Executions in Casanare

3. Cooperation between the ICRC and human rights bodies

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- FORTIN Katharine, “Complementarity between the ICRC and the United Nations and international humanitarian law and human rights law, 1948-1968”, in *IRRC*, Vol. 94, No. 888, 2012, pp. 1433-1454.

a. **dissemination**

CASES AND DOCUMENTS

- ICRC, Protection of War Victims [Para. 2.3.1]

a. **thought**

CASES AND DOCUMENTS

- Minimum Humanitarian Standards [Part B., para. 99]

a. **operations**

Footnotes

- [11] See 1966 Covenant on Civil and Political Rights, Art. 4(1), available on treaties.un.org ; European Convention on Human Rights , Art. 15(1), available on treaties.un.org; American Convention on Human Rights, Art. 27(1)
- [12] See explicitly European Convention on Human Rights, Art. 15(2), available on treaties.un.org. Other instruments only prohibit “arbitrary” deprivation of life.