

INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW IN SITUATIONS OF ARMED CONFLICT

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ABSTRACT

International Human Rights Law and International Humanitarian Law are two distinct areas of law both in origin and development, yet over the years Human Rights Law has had a major impact on International Humanitarian Law. This article considers the areas in which International Human Rights Law has played a part in armed conflict situations.

I. INTRODUCTION

Human rights law as embodied in international human rights instruments and humanitarian laws as embodied in the Geneva Conventions of 1949 and the Additional Protocols thereto, prohibiting attacks on civilian populations are systematically ignored and violated in armed conflict situations and military occupation, by armed and security forces and other parties to armed conflicts. By the end of the twentieth century, there was a dramatic increase in the number of countries which were involved in violent conflicts and wars. There was also a dramatic increase in the number of civilians affected by the deliberate and systematic violation of human rights. This was witnessed, for example, in wars which occurred in countries such as Yugoslavia, Rwanda, Somalia, Iraq, Turkey and Liberia, and Sierra-Leone, thus reminding us of the cruelty, suffering, destruction and death which occur in armed conflict situations.

For many decades now, there have been extensive debates on the application of human rights law to armed conflict situations, thus focusing on the relationship between International Humanitarian Law (IHL) and International Human Rights Law (IHRL). Even though it is now recognized that IHRL applies in armed conflict situations, there are certain obstacles which are encountered in the practical application of this law. This arises in situations where rights such as the right to life, the right to freedom from torture and other cruel and inhuman or degrading treatment or punishment, economic, social and cultural rights apply to both these bodies of law. This article considers how human rights law is applied in armed conflict situations and

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the practical problems encountered in its application. It also considers how these two bodies of law can work concurrently and also complement and reinforce each other.

II. CONSIDERATION OF BOTH BODIES OF LAW AND THE RECOGNITION OF HUMAN RIGHTS LAW IN ARMED CONFLICT SITUATIONS

IHL and IHRL vary in terms of their origin and the situations in which they apply. IHL applies in times of armed conflict, whether international or non-international.¹ It binds parties to the conflict, thus in the case of international conflicts, IHL must be observed by the States involved whereas in internal conflicts IHL binds the government as well as the groups fighting against it or among themselves. IHL aims to protect not only people who do not or are no longer taking part in hostilities but also civilians. Thus, it is necessary that the parties to a conflict distinguish between combatants and non-combatants and also between military and non-military targets. Their object of attack must not be on the civilian population as a whole neither on an individual civilian. They are also prohibited from attacking military objectives if that would cause disproportionate harm to civilians or civilian objects.

On the other hand since human rights are rights which are inherent to human beings, IHRL protects the individual at all times from abuse by the State² and thus it applies both in times of peace and in armed conflict. It lays down rules that bind States in their relations with individuals. There is however a growing body of opinion which remains unsettled that organized groups especially where they exercise government-like functions must also respect human rights. It is yet to be seen how the law will evolve in this regard.

Despite their differences, these two bodies of law share a common ideal that is the protection of the lives, health and dignity of individuals. Also many of their guarantees are identical, such as the protection of the right to life, freedom from torture

1. International conflicts are wars involving two or more states, they can also be wars of liberations, regardless of whether a declaration of war has been made or whether the parties involved recognize that there is a state of war. Non-international armed conflicts on the other hand are those in which government forces are fighting against armed insurgents, or rebel groups are fighting among themselves.

2. *See, e.g.*, Article 2, International Covenant on Civil and Political Rights, 99 U.N.T.S.171; Article 15, European Convention for the Protection of Human Rights and Fundamental Freedoms, U.N.T.S. 123; and Article 27, American Convention on Human Rights, 1144 U.N.T.S.123.

and ill treatment and the protection of family rights.³ The recognition by universal and regional human right bodies that human rights law applies to armed conflict situations bridged the gap between the separation of the law of peace and the law of war.⁴ The concurrent application of these two bodies of law was expressly recognized, for example, by the International Court of Justice in its Nuclear Weapons Advisory Opinion on the application of human rights in situations of armed conflict, with respect to the International Covenant on Civil and Political Rights (ICCPR). It rejected the position that the Covenant could only be applied in peace time and observed that:

... the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provision may be derogated from in time of national emergency. Respect for the right to life is not, however such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. ... Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁵

The Court has held on to this view, which is observed from one of its fairly recent advisory opinions. In the Advisory Opinion on the Legal Consequences of a Wall in

3. Debates on the relationship between Human Rights Law and International Humanitarian Law tend to focus on civil and political rights in particular with regard to the use of force and deprivation of liberty, more than economic, social and cultural rights even though these latter rights are equally as important as the former ones. Economic, social and cultural rights where humanitarian law is concerned, includes issues such as ensuring adequate food supplies and protecting health during armed conflict. However when these issues are being dealt with, the focus of attention is usually placed on the relevant international humanitarian law rules than the human rights point of view. Article 6 of the Geneva Convention (IV), relative to the Protection of Civilian Persons in Time of War, dealing with a number of welfare provisions, does not apply beyond a year after the general close of military operations. It is likely that in such cases human rights law may fill the gap when the occupying power continues to exercise government functions.

4. These are various international tribunals: the International Court of Justice, the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Commission on Human Rights and national courts.

5. ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, ICJ Reports 1996, ¶ 25.

the Occupied Palestinian Territory:

... the court consider[ed] that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: 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.⁶

There are also international treaties and instruments, such as the Convention on the Rights of the Child of 1989,⁷ the Rome Statute of the International Criminal Court⁸ and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000,⁹ which have incorporated or drawn from both human rights and international humanitarian law provisions.

III. DEROGATION AND NON-DEROGATION

IHL is non-derogable as it deals with an exceptional situation, namely armed conflict, (the only exception can be found in Article 5 of the Fourth Geneva Convention). Although IHRL applies at all times, that is, during peacetime and in situations of armed conflict, there are some IHRL treaties which permit a State Party to derogate from certain rights in situations of public emergency threatening the life of the nation, which includes situations of armed conflict. This is clear from the wordings of such treaties

6. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, ¶ 106.

7. Art. 38, Convention on the Rights of the Child, 1989, 1577 U.N.T.S. 3. What is peculiar is that this article, which applies in peacetime, also contains provisions, which are applicable in armed conflict situations thus demonstrating the overlap between the law of peace and that of war, and the necessity of taking international human rights law into consideration. Article 77 of Additional Protocol I to the Geneva Conventions which provides that children who have not attained the age of fifteen years do not take direct part in hostilities and, in particular should not be recruited in the armed forces is replicated in Articles 38(2), (3) and (4).

8. Rome Statute of the International Criminal Court, 2002, 2187 U.N.T.S. 3.

9. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, 2000, 1577 U.N.T.S. 3.

as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights, which expressly allows for derogation of certain rights “in time of war or other public emergency.”¹⁰ On the other hand, for example, the ICCPR in its Article 4 (which provides for derogation) makes no mention of war. The omission was deliberately made in the course of drafting the Covenant. Where a derogation clause exists a State Party may only derogate from its obligations under the treaty,

to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.¹¹

Derogation cannot be invoked lightly as it must be proportional to the crisis at hand and must not be introduced on a discriminatory basis. It must not contravene other international law rules, which includes IHL rules. In the case of *Lawless v. Ireland*, for example, the applicant who was a member of the Irish Republican Army claimed that his detention was a violation of Article 5 of the European Convention on Human Rights. The court considered the Irish Governments’ specific measures of derogation and found that they could be characterized as measures strictly required by the exigencies of the situation.

There are however certain rights, which are non-derogable, that is they are to be applied in all circumstances, without exception. For example under the ICCPR, Articles 6 (right to life) and 7 (torture or cruel, inhuman or degrading treatment) may not be derogated from.¹² It is a requirement that derogations must be officially

10. Article 15, European Convention for the Protection of Human Rights and Fundamental Freedoms; and Article 27, American Convention on Human Rights. Public emergency was defined by the European Commission on Human Rights as “a situation of exceptional and imminent danger or crisis affecting the general public ... constituting a threat to organized life of the community ... while a different approach, stressing on the term “war” retained a “public emergency” as a situation “tantamount to war.” See, ECHR, *Lawless v. Ireland*, 1960-61.

11. Article 4, International Covenant on Civil and Political Rights. See also, Article 15, European Convention for the Protection of Human Rights and Fundamental Freedoms; and Article 27, American Convention on Human Rights.

12. Article 4(2) of the Convention provides a full list of the articles, which may not be derogated from. The Convention for the Protection of Human Rights and Fundamental Freedoms corresponding articles to this are found in Articles 2 and 3 (derogation only allowed in respect of death resulting from lawful acts of war), and the American Convention on Human Rights in Articles 3 and 4.

proclaimed and notified to the other States Parties to the treaties.¹³ This provides a means of ensuring compliance with IHL and IHRL where they overlap.

IV. EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS OBLIGATIONS

One of the problems in applying human rights law in international armed conflict including situations of occupation is with regard to the extra-territorial obligation of a State, as the State would likely be operating outside its borders. As human rights must continue to apply even after the outbreak of the armed conflict, the question thus arises as to whether human rights obligations can extend to actions of State forces outside the State's recognized borders.

A. *Effective Control over a Territory*

There have been a number of cases where human rights obligations have been applied to areas under the effective control of the State. This also includes situations of military occupation and troops taking part in peacekeeping operations. The rationale behind applying human rights law extraterritorially to situations where States have effective control over a territory, is to effectively and practically ensure respect for human rights. Consideration is given as to the application of various human rights treaties where such situations arise. The UN Human Rights Committee has considered the application of Article 2(1) of the ICCPR¹⁴ with regard to respecting and ensuring the Covenant rights

13. Article 4(3) International Covenant on Civil and Political Rights, Article 15(3) Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 27(3) American Convention on Human Rights. There may be instances where the human rights bodies concede that the situation on the ground in relation to the case being decided by them called for exceptional measures, yet no declaration of a derogation has been addressed to the appropriate body. This was the situation in the cases of *Isayeva, Yuzupova & Bazayeva v. Russia* (ECHR, *Isayeva, Yuzupova, Bazayeva v. Russia*, 57947/00, 57948/00, 57949/00, 24 February, 2005, 129) and *Isayeva v. Russia* (ECHR, *Isayeva v. Russia*, 57950/00, 24 February 2005, 128) both of which were decided by the European Court of Human Rights. These cases concerned the conduct of hostilities during military operations and what measures should have been taken to avoid or reduce the risk of incidents involving the civilian population and damage to property. Since no declaration under Article 15 had been addressed to the Council of Europe, the operations which had been conducted by the Federal Army were evaluated by the court as occurring in a normal legal contest.

14. Article 2(1) provides that "each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or opinion, national or social origin, property or other status."

to all persons who may be within the State Party's territory and to all persons subject to the State Party's jurisdiction. In its General Comment 31, the Committee held that by Article 2(1) of the Covenant, State Parties are required 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 these 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. The Committee then went on to state that the principle is also applied 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 operations.¹⁵

The Committee has confirmed its position in particular to situations of military occupation,¹⁶ and also with regard to troops taking part in peacekeeping operations.¹⁷ This was the case in Northern Cyprus and in the occupied Palestinian territories. The International Court of Justice adopted a similar approach to that of the Committee with regard to the ICCPR, in its 2004 Wall Advisory Opinion. In interpreting Article 2(1) of the Covenant, the court found that reference to the object and purpose of the Covenant implied that the Covenant is applicable in respect of acts done by a State Party to the Covenant in exercise of its jurisdiction outside its own territory.¹⁸

15. General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP/4/Rev.6 (2004), para. 10, available at <[www.unhcr.ch/tbs/doc.nsf\(Symbol\)CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf(Symbol)CCPR.C.21.Rev.1.Add.13.En?Opendocument)>, (accessed on 23 March 2009).

16. Concluding Observations on Cyprus, UN Doc. CCPR/C/79/Add 39, Sept. 21, 1994, ¶ 3; Concluding Observations on Israel, 11, UN Doc. CCPR/CO/78/ISR, Aug. 21, 2003.

17. Concluding Observations on Belgium, CCPR/C/79/Add99, Nov. 19, 1998, ¶ 17; Concluding Observations on Belgium, CCPR/CO/81/BEL, Aug. 12, 2004, ¶ 6.

18. *Wall* case, *supra* note 6, ¶¶ 108-111.

1. *Extraterritorial Applicability of the European Convention on Human Rights.*—In considering if an applicant’s human rights have been violated in an extraterritorial situation, the European Commission of Human Rights and the European Court of Human Rights have considered the meaning of “jurisdiction” under Article 1 of the Convention.¹⁹ This is because the exercise of jurisdiction is considered a necessary condition for Contracting States to be able to be held responsible for acts or omissions imputable to it, which gives rise to an allegation of the infringement of rights and freedoms set forth in the Convention.²⁰

The concept of “jurisdiction” for purposes of Article 1 of the Convention is thus taken to reflect its meaning in public international law. From the standpoint of public international law, the European Commission of Human Rights and the European Court of Human Rights have held that the term “within their jurisdiction” would not be equivalent to or limited to the national territory of the High Contracting Parties. Their responsibility can also be engaged because of acts of their authorities producing effects outside their territory. This would depend on whether or not that State had effective control over the territory in question.

The case of *Cyprus v. Turkey*,²¹ concerned the occupation of Northern Cyprus by Turkish forces in the aftermath of a large-scale military intervention, which occurred in July 1974. Cyprus claimed that Turkey had violated several rights guaranteed by the Convention when it invaded it in July 1974 and occupied Northern Cyprus. The European Commission on Human Rights held that the Contracting States “are bound to secure the rights and freedoms of all persons under their actual authority and responsibility, not only when that authority is exercised” within their own territory but also when it is exercised abroad. The European Court of Human Rights in cases such as *Loizidou v. Turkey*²² and *Issa & Others v. Turkey*²³ also applied this principle of effective control. *Loizidou v. Turkey* concerned human right violations, which arose out of a military occupation. The applicant and the Cypriot government maintained that ever since the Turkish occupation of northern Cyprus, the applicant had been denied access to her property and as a result of this, lost all control over it.²⁴ The court stated:

19. Article 1 of the European Convention on Human Rights states that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedom defined in Section 1 of this Convention.”

20. ECHR, *Issa & Ors v. Turkey*, App. No. 31821/96 (Final), 30 March 2005, ¶ 66.

21. ECHR, Appl. No. 25781/94, 10 May 2001.

22. ECHR, Preliminary Objections, 23 February 1995, 103 ILR 622, ¶¶ 62-64.

23. See *supra* note 20.

24. *Supra* note 22.

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when, as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

The court in *Issa & Ors v. Turkey* distinguished its own decision from those in *Loizidou v. Turkey* and *Cyprus v. Turkey*. The applicants in the *Issa* case complained of the alleged unlawful arrest, detention, ill treatment and subsequent killings of their relatives in the course of a military operation conducted by the Turkish army in northern Iraq in April 1995. The court found that the armed forces of Turkey in the latter two cases were in total more than 30,000 personnel, which was no less than that alleged by the applicants in the *Issa* case. However the difference was that in the latter two cases, the troops in northern Cyprus were present over a much longer period of time and stationed throughout the whole territory of northern Cyprus. In addition to this, the area was patrolled and had checkpoints on all the main lines of communication between the northern and southern parts of the island. In the *Issa* case, on the other hand there was no evidence that the Turkish troops conducted operations in the area where the alleged killings took place.²⁵ This case thus gives support to the fact that effective control does not mean control over every act or part of the territory, but that effective overall control over a territory is sufficient.

In the case of *Bankovic v. Belgium*,²⁶ the court dismissed as inadmissible an application by the relatives of individuals who were killed in the 1999 bombing of a Belgrade building of the Radio Television of Serbia (RTS) during the North Atlantic Treaty Organization (NATO) air strikes against the Federal Republic of Yugoslavia (FRY). The application was brought against all the European NATO member states, which are also parties to the Convention for the Protection of Human Rights and Fundamental Freedoms. The FRY was not, and is still not, a party to the Convention. The applicants argued that the respondent States' control over FRY airspace was "nearly as complete as Turkey's control over the territory of northern Cyprus" and that this brought the RTS strike within the jurisdiction of the respondent States. This

25. ECHR, *supra* note 20, ¶ 75-76.

26. ECHR, *Bankovic & Ors v. Belgium & 16 Other Contracting States*, Case No. 52207/99, 12 December 2001.

argument was dismissed by the Grand Chamber, which held that NATO did not have effective overall control over FRY since the notion of jurisdiction under Article 1 of the Convention was primarily territorial. That a State could not exercise jurisdiction on the territory of another state without the latter's consent, invitation and acquiescence, unless the former is an occupying State in which case, it can be found to exercise jurisdiction in that territory, at least in certain respects. That in the absence of effective ground control of a territory, precision air strikes and control of airspace did not create responsibility under the Convention.²⁷

Before the decision of the Grand Chamber on subsequent cases regarding jurisdiction on extraterritorial application of the Convention, its decision regarding this issue in the *Bankovic* case was taken as being restrictive. The post-*Bankovic* cases such as *Iiascu v. Moldova & Russia* and *Oclan v. Turkey*²⁸ clarified this. *Iiascu & Others v. Moldova & Russia*²⁹ concerned human rights violations in Transdniestria, an area of Moldova subject to a separatist regime supported by Russia. By a majority of 16 to 1 the Grand Chamber held that Russia exercised jurisdiction whilst by 11 to 6 votes Moldova also exercised jurisdiction. Russia was found to be responsible for human rights violations by the court, on the basis of the presence of a small number of its troops. However, since Moldova lacked effective control, it was not held responsible for the human rights violations save to the extent that they arose out of failures by Moldova to comply with its positive obligations:

to take diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.³⁰

Effective control for purposes of human rights appears to be broader and more flexible than that of occupation in humanitarian law, where the obligations of the occupying

27. *Id.* This case also illustrates the importance of being a party to a treaty in order to benefit from it. The FRY was not, and is still not a party to the Convention, which meant that its citizens were deprived of any rights that they were previously granted and therefore had no claim to a remedy for human rights grievances. Thus, a particular action taken by a contracting state in the territory of another state would not be governed by the first states Convention obligations if the second state is also not a party to the Convention.

28. Grand Chamber Judgment, 12 May 2005.

29. ECHR 2004-VII. The reason why Russia was found responsible was because it had set up the regime, which remained under its effective authority or decisive influence. Russia also gave that regime military, economic, financial and political support.

30. Referred to in *Al-Skeni v. Sec. of State for Defence* [2005] EWCA (Civ) 1609, ¶ 116.

State are absolute. From case law decided by the European Court of Human Rights, the degrees of control under human rights law varies and so also the obligations of the State. This was noted in the comparison made between the cases of *Issa & Ors v. Turkey*, *Loizidou v. Turkey* and *Cyprus v. Turkey*.

On the other hand, in the *Al-Skeini* case,³¹ though British troops were said to occupy two provinces of Iraq in 2003, they had no effective control in a third province for the purpose of applying the European Convention on Human Rights, as the United Kingdom possessed no executive, legislative or judicial authority in that province. The British troops were only in that province to maintain security in a situation on the verge of anarchy. The appellants in this case were relatives of Iraqi civilians who died by the actions of British soldiers in southern Iraq in the latter part of 2003 (between the cessation of major combat operations and the handover of sovereignty to the Iraqi interim government). Five of the deceased were shot in the course of security operations (one in cross-fire); the sixth deceased died following gross ill treatment whilst in custody in a United Kingdom military detention facility.

2. *The Inter-American Commission of Human Rights.*—The Commission recognizes jurisdiction over acts committed outside a State's territory. This is based on the fact that since human rights are inherent to all human beings, it is for the States to guarantee a person under their jurisdiction the protection of their human rights. This includes any person subject to its authority and control.³²

B. Power over a Person

Human rights obligations will also apply extraterritorially where state agents have authority and control over an individual. While it is clear that this would cover situations where an individual is abducted, detained or ill-treated, the European Court of Human Rights or the Human Rights Committee are not to decide on if States would be held responsible for extraterritorial killings. *Ocalan v. Turkey*,³³ for example, concerned (in part) the applicant's arrest by members of the Turkish Security Forces inside a Turkish registered aircraft in the international zone of Nairobi Airport. The Grand Chamber stated the basis upon which it accepted that Turkey had exercised

31. *Id.*, ¶ 119.

32. Inter-Am. CHR, *Coard v. the United States of America*, Case No. 10,951, OEA/ser.L/V/II.106.doc.3rev (1999), ¶¶ 37.

33. See also, *Lopez Burgos v. Uruguay*, Comm. No. 52/1979, UN Doc. CCPR/C/13/D/52/1979, 1981, which concerned violations of ICCPR by state agents on foreign territory.

jurisdiction over the applicant as follows:

It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the 'jurisdiction' of that state for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey.³⁴

V. THE APPLICATION OF *LEX SPECIALIS* IN INTERNATIONAL HUMANITARIAN LAW

The principle of *lex specialis* in armed conflict situations applies in instances where human rights law and humanitarian law are incompatible and there is a conflict between them. As already established, IHRL protects individuals at all times from abuse of the State, which also includes armed conflict situations. If the application of IHRL conflicts with that of IHL, one of the rules must prevail. In such a situation the principle of *lex specialis*, (that is where a rule displaces the more general rule) will apply. Which law displaces the other will depend on how close the situation is to the battlefield. Thus where the use of force is at stake and it could be said that military operations are ongoing and that the armed forces have no real control over the situation and were not conducting a law enforcement operation, IHL would be the more appropriate law to apply, rather than IHRL, for the conduct of hostilities. On the other hand where the situation is remote from the battlefield and the state authorities had enough control over a situation to be able to carry out law enforcement operations, IHRL would be the more appropriate law to apply.

The International Court of Justice in its advisory opinions on the Nuclear Weapons³⁵ and the Wall case³⁶ applied this principle. In the Nuclear Weapons case, it was argued that the use of nuclear weapons violated the right to life laid down in Article 6 of the ICCPR.³⁷ The court was of the view that the right under Article 6 is non-

34. *Supra* note 28, ¶ 118.

35. ICJ, *supra* note 5, ¶ 26.

36. ICJ, *supra* note 6, ¶ 101.

37. Article 6(1) provides that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

derogable and thus applies in armed conflict and that even during hostilities it is prohibited to arbitrarily deprive a person of his life. However, the court defined the term arbitrarily according to IHL by recognizing the primacy of IHL over IHRL in armed conflict.

Whilst the Inter-American Commission has also followed the decision of the International Court of Justice, the European Court of Human Rights and the African Commission on Human and Peoples' Rights are yet to give their own opinion on the matter. The Human Rights Committee, on the other hand, in avoiding to deal with the issue, found both spheres of law to be complementary and not mutually exclusive.³⁸

VI. CAN HUMAN RIGHTS BODIES APPLY INTERNATIONAL HUMANITARIAN LAW WHERE A VICTIM'S HUMAN RIGHTS HAVE BEEN VIOLATED IN AN ARMED CONFLICT SITUATION?

An individual can bring a matter before an independent body with regard to violation of his civil and political rights.³⁹ However, there is no such procedure available where the individual's rights have been violated under IHL, even though many serious violations of humanitarian law which occur also constitute serious violations of human rights. The question thus arises as to whether the human right bodies have the mandate to make pronouncements on violations of IHL, taking into consideration the fact that the provisions of a treaty appears to limit their mandate as contained in that treaty.⁴⁰ Consideration as to how these bodies have dealt with such matters will be discussed.

A. The European Convention on Human Rights

The various bodies of the European Convention on Human Rights have been hesitant to make direct reference to IHL in their decisions. In *Cyprus v. Turkey*,⁴¹ though the

38. General Comment 31, *supra* note 15, ¶ 11.

39. For example, under Article 1 of the (First) Optional Protocol to the International Covenant on Civil and Political Rights, the Human Rights Committee may receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. Such an individual must have exhausted all domestic remedies before filing such a complaint to the Human Rights Committee. The Human Rights Committee will then consider whether the individual's human rights have been violated.

40. Article 1 of the Optional Protocol, for example, limits the Human Rights Committee's jurisdiction to "any of the rights set forth in the Covenant" which would mean that international humanitarian law cannot be directly applied.

41. *Supra* note 21.

European Commission on Human Rights allowed the application of the Third Geneva Convention of 1949, it considered whether there had been a violation of Article 5 of the Convention, which deals with the right to liberty and security.

In *Loizidou v. Turkey*,⁴² the applicant's complaint of refusal of access to her property, was made according to Article 1 of the Additional Protocol 1 to the Convention, that is violation of her right to peaceful enjoyment of her property as well a continued violation of the right to respect for her home under Article 8 of the Convention. Although the court recalled that the Convention should be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 of the Law of Treaties and that Article 31 paragraph 3(c) of the Vienna Convention indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties," it did not apply international humanitarian law. Judgment was given in the complainants favour applying Article 50 of the Convention.

In *Bankovic v Belgium*,⁴³ the applicants complained that the bombardment of the RTS headquarters by NATO violated some of their rights under the European Convention on Human Rights.⁴⁴ They also based their claim on States' duties arising from IHL, as the NATO States were party to the Geneva Conventions and the relevant rules of the Additional Protocol 1, and contended that both these set of rules contained norms of customary nature. The court did not consider the IHL argument but the notion of jurisdiction under Article 1 of the Convention was preferred.

In the latter cases brought before the European Convention on Human Rights bodies, the trend by the bodies has been to make use of IHL principles to interpret specific situations, without actually referring to them by name as seen in *Ergi v. Turkey*.⁴⁵ The issue in this case was whether the killing of a person during a terrorist related ambush operation was necessary. The European Court of Human Rights found that the State had failed to take "all feasible precautions in the choice of means and methods of a security operation"⁴⁶ involving the placement of an ambush in protecting the lives of the civilian population. The Court used the language of IHL to consider the alleged human rights violations by the Turkish security forces in the Kurdish areas.⁴⁷

42. *Supra* note 22.

43. *Supra* note 26.

44. The right to life under Article 2, freedom of expression under Article 10, and right to an effective remedy under Article 13.

45. ECHR, App. No. 23818/93, 28 July 1998.

46. *Id.*, ¶ 79.

47. See also, ECHR, *Gulec v. Turkey*, App. No. 21593/93, 27 July, 1998 and ECHR, *Engel v. The Netherlands*, App. No. 5370/72, 23 November, 1976.

A possible explanation why the Court may have been cautious in applying IHL in their decisions may be because it is an expert in human rights law, rather than IHL. Certain terms used in IHRL and IHL have different meanings, and if the court were not trained to use IHL language, it is possible that a different decision from that which was intended may be reached.

B. The Inter-American Commission on Human Rights

Article 44 of the American Convention of Human Rights provides that:

Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violations of this Convention by a State Party.

This implies that only breaches of the Convention can be prosecuted. This would mean that neither the Commission nor the Court might examine alleged violations of other international treaties, as they would fall outside the scope of the Convention. To do otherwise would mean that an obligation is being imposed upon a State without its consent, which would be contrary to Article 34 of the Vienna Convention 1969, which provides that obligations can only be created for a State if that State has expressly accepted them.

There have however been quite a number of reports where the Commission has sought to justify its application of IHL to specific situations, which individuals have brought against State Parties.⁴⁸ Its report in the *Tablada (Abella)*⁴⁹ case is an example of this. This case concerned the attack of the military barracks of La Tablada, in January 1989, for almost thirty hours by 42 armed persons who allegedly feared a new *coup d'état* would occur. The surviving attackers, applied to the Commission, complaining that Argentina had violated both HRL and IHL when responding to the assault. The Commission directly applied IHL (in particular Article 3 Common to the four Geneva Conventions of 1949) and did not use it merely as an aid to interpret HRL. Its explanation for applying IHL was because:

48. The case of *Disabled Peoples' International et al. v. United States* was the first attempt which the Commission made to deal with this problem. See, Inter-Am.EH.R., App. No. 9213, 184, OEA/Ser.L/V/II.71.doc.9 rev IV.C(3), April 17, 1987.

49. Inter-Am.CHR, *Juan Carlos Abella v. Argentina*, Case No. 11,137, Report No. 55/97, OEA Ser.L/V/II.98.Doc.6.Rev (1998), 18 November 1997.

... The Commission's ability to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can lawfully be attacked or when civilian casualties are a lawful consequence of military operations.⁵⁰

In the *Las Palmeras* case,⁵¹ the Inter-American Court did not follow the Commission's decision that Colombia had violated Common Article 3 of the Geneva Convention. This case concerned the execution of six unarmed civilians by the Colombian police force. It ruled that neither the Commission nor the mandate allowed it to make direct pronouncements on violations of IHL. In paragraph 33 of its ruling, for example, it stated that the American Convention "has only given the court competence to determine whether the acts and norms of the States are compatible with the Convention itself and not with the 1949 Geneva Convention". The court left open the possibility of using Common Article 3 of the Geneva Convention as an effective tool of interpretation, when dealing with the violations of HRL norms during armed conflict situations.

In the later cases of *Bamaca Velasquez*⁵² and *Mapiripan Massacre*,⁵³ IHL was used as an effective tool of interpretation in applying HRL rules. The case of *Bamaca Velasquez* concerned a guerrilla fighter who was tortured and murdered by the Guatemalan military during a battle. The Commission requested that the Inter-American Court should decide on the responsibility of Guatemala for the violations of several articles of the American Convention on Human Rights and also certain articles of the Inter-American Convention to Prevent and Punish Torture and Article 3 Common to the Geneva Conventions. In justifying its decision to use IHL as an effective tool of interpretation to HRL rules the Court stated in paragraph 208 that:

Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties

50. *Id.*, ¶¶ 158-61.

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

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

53. Inter-Am. CHR, *Mapiripan Massacre v. Columbia*, Case No. 134, Judgment of 15 Sept. 2006.

that do not grant it such competence, it can observe that certain acts of omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and in particular, Common Article 3.

The Court then went on to state in paragraph 209:

Indeed there is a similarity between the content of Article 3, Common to the 1949 Geneva Conventions and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment). This court has already indicated in the *Las Palmeras* case, that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention.

VII. CONCLUSION

There is no doubt that over the years the importance of human rights has been recognized in armed conflict situations. Though IHL and IHRL have different origins and are distinct in their application, they share a common goal to protect the lives, health and dignity of persons. However these two bodies of law can no longer be compartmentalized taking into consideration the fact that violations of humanitarian law in most cases also constitute violations of ones human rights at the same time. Since it is unlikely that IHL will be changed in the near future to favour individuals to bring claims for violations in this area of law, it is necessary to overcome the challenges both bodies of law face when making decisions regarding armed conflict situations where such laws are involved, be overcome. One such challenge is the difference between the language of both bodies of law which each would need to comprehend in order to be able to use them.