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ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

**Working paper on the relationship between human rights law
and international humanitarian law by Françoise Hampson
and Ibrahim Salama***

Summary

The present working paper is in two parts. Part I, by Mr. Salama, addresses generally the issue of the relationship between human rights law and international humanitarian law, identifying areas of possible further study, particularly with regard to prevention and to the institutional response to violations in situations of conflict. Part II, by Ms. Hampson, examines whether the two legal regimes can be simultaneously applicable, in the light of the jurisprudence of human rights treaty bodies and special procedures. It suggests that, where international humanitarian law is applicable, it should be taken into account by human rights bodies. Part II then considers the extent to which human rights law is applicable extraterritorially, again in the light of the practice of human rights bodies. The paper concludes by identifying areas which could be the subject of further study. The authors consider that it would be highly desirable to create a working group of the Sub-Commission to consider these issues.

* In view of the length of this document, which exceeds the limits set by the General Assembly, the endnotes are being circulated as received, in the language of submission only.

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INTRODUCTION

1. In decision 2004/118 the Sub-Commission asked Françoise Hampson and Ibrahim Salama to prepare a working paper on the relationship between human rights law and international humanitarian law. The present document is submitted in accordance with that request.

PART ONE

Introduction

2. “When it comes to laws on the books, no generation has inherited the riches that we have. We are blessed with what amounts to an international bill of human rights, among which are impressive norms to protect the weakest among us, including victims of conflict and persecution But without implementation, our declarations ring hollow. Without action, our promises are meaningless.” Those words of the United Nations Secretary-General in his report “In larger freedom, towards development, security and human rights for all”,¹ describe a dilemma for the human rights movement, a tragedy for the victims of human rights violations and international humanitarian law (IHL) violations and a challenge for the Sub-Commission on the Promotion and Protection of Human Rights to consider and reflect upon.

3. Armed conflict by definition defies the basic idea of modern law. Ensuring minimal respect for human rights and dignity during armed conflicts continues to challenge the international community. The difficulties of reconciling the contradictory notions of order and disorder, law and force, human dignity and war could only be aggravated by scientific development, weapons of mass destruction, terrorism and many other modern transnational phenomena. The worst of all these phenomena undoubtedly remains the widening gap between moral progress and technological advances. A fundamental requirement for the human rights community in facing these challenges and bridging that gap is to be constantly inspired by the inextricable links between human rights law (HRsL), IHL and international refugee law, which all emanate from the same basic concern: ensuring respect for human dignity in all times, places and circumstances. Remembering this fundamental *raison d’être* is a prerequisite for breathing new life into IHL.

4. Contrary to major HRsL conventions, IHL is not monitored by treaty bodies or any other viable and binding mechanism to supervise its implementation and contribute, through both general and specific comments, to its progressive development. In an era when the defining theme of the international community and the key factor in international policy-making is human rights, it is inadmissible and unjustifiable that such a huge protection gap be hidden behind artificial distinctions and false legalistic arguments. Even if one disagrees with some of its implications, the main thrust of the following statement by the Secretary-General remains undebatable: “no legal principle - not even sovereignty - should ever be allowed to shield genocide, crimes against humanity and mass human suffering”.²

I. PREMISES AND PROBLEMATICS

5. However impressive it may appear, the existing array of legal instruments related to the protection of civilians during armed conflicts did not provide sufficient protection on the ground. The international community still witnesses large-scale brutalities and massive human rights abuses. In this context, the relationship between IHL and HRsL is paradoxical in the sense that there is an increasing awareness on the part of the international community of the convergence between those two sets of norms, while there is also an unexploited potential of complementarity.

6. The notion of *lex specialis* does not place HRsL and IHL in an either/or situation for the totality of both sets of norms, which are two mutually supportive branches of the same discipline. Most of the major human atrocities in history, whether or not committed during an armed conflict, started with trends, ideologies, sporadic actions or other form of triggering events which developed later into some of the worst crimes that humanity ever witnessed. The Holocaust, for example, started with racist ideology and sporadic events which remained unaddressed till all the well-known atrocities were committed. IHL is weak as far as follow-up and early warning mechanisms are concerned. It is therefore imperative to study possible institutional complementarity and mutual reinforcement between both bodies of norms.

7. There is no doubt that 60 years ago means of communications were not as developed as they are at present, but one has also to admit that even in modern times with the abundance of information we can get on all topics and developments, the international reaction to many widespread human rights violations can be delayed for the single and simple reason of lack of efficient specialized monitoring systems leading to lawful international intervention that addresses grave and urgent situations. By this we do not only mean a reformed Security Council which implements the provisions of the Charter in all circumstances without discrimination. It is equally important to enhance IHL mechanisms to ensure respect for its provisions before violations constitute a threat to international peace and security. The solemn promise of “never again”, in the preamble to the Charter, was broken in Rwanda and elsewhere.

8. One major difference between IHL and HRsL is that the latter enjoys additional protection through the advocacy of non-governmental organizations (NGOs) and monitoring by national human rights institutions. These bodies, in addition to public opinion and the civil society at large, play a decisive role in bringing State practices into conformity with international human rights norms and standards. All those actors obviously have less access to information and freedom of interaction with the realities of armed conflict. It is therefore necessary to compensate for such a monitoring gap through better use of human rights mechanisms in situations of armed conflict. The normative discrepancies between HRsL and IHL do not preclude the necessary institutional complementarity between these two branches of the same discipline aiming at one single objective: ensuring respect for human dignity in all circumstances. Some of the discrepancies between IHL and HRsL as well as the nature of armed conflict affect the role of NGOs, which is not easy to exercise in times of armed conflict. Notwithstanding security concerns, some IHL notions such as “military necessity” and “collateral damage” are not easy to accept in a “traditional” HRsL context. Special training for certain NGOs may therefore be required in order to better serve the necessary complementarity between IHL and HRsL norms and standards in practice.

II. POTENTIAL MUTUAL REINFORCEMENT

9. Violating IHL is by definition violating human rights, while ensuring respect for IHL does not necessarily ensure respect for all human rights. Full respect for all human rights in the final analysis should lead to end the need to resort to IHL protection in the first place. The Commission on Human Rights, in resolution 2005/63 on the protection of human rights of civilians in armed conflicts, settled on three premises: “that human rights and humanitarian law are complementary and mutually reinforcing”, that “the protection provided by human rights continues in armed conflict situations, taking into account when international humanitarian law applies as a *lex specialis*” and finally “that conduct that violates humanitarian law ... may also constitute a gross violation of human rights”. Those indeed are the three pillars complementing and mutually reinforcing IHL and HRsL. This complementarity is not only theoretical but extends to the implementation level. We agree with Rosemary Abi-Saab:

“If humanitarian law and human rights law have as a common and identical objective the protection of the individual from all possible attempts on his personal integrity, in armed conflicts or in peacetime, it is no surprise that these two branches of international law should find complementarity. ... It is a two-way process, where a humanitarian law approach can complement or substitute for a human rights approach to protect individuals in situations where the protection of human rights is seriously restricted or totally suspended Beyond this obvious interpenetration between human rights and humanitarian law in the formulation and content of the rules and in their practical implementation, the interrelationship of the two can be useful in the context of implementation. Resort to human rights as norms of general international law applicable in all situations, above and beyond treaty obligations, will help identify general obligations and their eventual violations, thus opening the way for the condemnation of these violations.”³

10. Resolution 2005/63 was not the first sign of recognition of the complementarity of IHL and HRsL; it only indicated an existing, cumulative process of rapprochement between two branches of the same discipline. There are many precedents of the Commission conferring mandates over IHL issues in different country situations to special rapporteurs, fact-finding missions and commissions of inquiry established by special sessions or special sittings. Standard-setting exercises of the Commission also covered such IHL issues as children in armed conflict.

11. This resolution is in fact a reflection of a pressing, growing need for an innovative victim-oriented approach to both IHL and HRsL. As H.J. Heintze points out:

“Legal literature aptly points out that human rights protection not only shares a common philosophy with international humanitarian law, but can also be used to compensate for the deficits of international humanitarian law. The underdeveloped implementation mechanisms of international humanitarian law, which have to be described as fairly ineffective, are among its great weaknesses. So it comes as no surprise that both the [International Committee of the Red Cross] and academics have

on numerous occasions attempted to use the implementation mechanisms of the United Nations human rights treaties, disarmament treaties and environmental treaties as possible systems to ensure compliance with international mechanisms [through] the State reporting procedures.”⁴

12. Enhancing the effectiveness of IHL and its institutional complementarity with HRsL does not necessarily require amending existing norms nor setting new standards. If properly used and fully implemented, existing instruments can achieve that goal. For example, the establishment of ad hoc international criminal tribunals and the International Criminal Court was a response to the brutal and large-scale violations of both IHL and HRsL in various parts of the world; by prosecuting those responsible for such serious violations a degree of deterrence may be achieved.

13. Nevertheless, the basic weakness of States’ international criminal law obligations is the lack of monitoring of State actions to give effect to their international obligation to prosecute at the national level. If human rights law has “borrowed” the principle of *aut dedere aut judicare* from IHL, it still does not monitor its implementation. States may hesitate for obvious political, legal or financial reasons to prosecute their nationals for crimes arising out of armed conflict, and even in the event of referral to national courts for prosecution they may attempt to influence the impartiality of their own judiciary vis-à-vis such cases. In some cases successor regimes favoured reconciliation over accountability, and the result is impunity for grave breaches of IHL and other human rights violations.

14. These are only two examples of areas where human rights mechanisms can play a role in closing the protection gap. IHL is relatively weak to impose criminal sanctions. Any IHL enforcement measure is subject to the consent of the parties to a conflict, which means subject to the balances of power, or to their respective national courts with their well known limitations in such cases. Only human rights mechanisms still can have a legal foundation and a general mandate in most cases where protection is needed. By exercising this general mandate in relation to armed conflicts human rights mechanisms can demonstrate that HRsL and IHL are different branches of the same discipline and that the initial vision of the Charter of the United Nations requires their institutional complementarity.⁵

15. The institutional complementarity of IHL and HRsL also finds an important conceptual and legal basis in the Martens Clause, which states that regardless of treaty law obligations during armed conflicts all civilians “remain under the protection and authority of the principles of international law derived from established customary law, from the principles of humanity and the dictates of public conscience” (article 1, paragraph 2, of Additional Protocol I to the four Geneva Conventions of 1949). This provision of IHL is potentially of great practical and institutional significance.

16. In fact, in its Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict of 8 July 1996, the International Court of Justice considered that the Martens Clause “has proved to be an effective means of addressing the rapid evolution of military technology” (paragraph 78 of the opinion). More than being simple moral guidelines, the “principles of humanity and dictates of public conscience” are therefore legally binding yardsticks against which we have to measure all acts, developments and policies with respect to human rights.

17. In his dissenting opinion, Judge Shahabuddeen (pp. 22-23) stated that the Martens Clause was not only a confirmation of customary law, but also established “principles of humanity and the dictates of public conscience” as legal principles. He in fact quoted the United States Military Tribunal at Nuremberg in the *Krupp* case in 1948 which stated that this principle had been transformed “into the legal yardstick to be applied if and when the specific provisions of the Convention ... do not cover specific cases ...”. For Judge Weeramantry the Martens Clause already indicates that, “behind such specific rules as had already been formulated, there lay a body of general principles sufficient to be applied to such situations as had not already been dealt with”.

18. It is obvious that the development of HRsL increases the frequency of potential violations of the Martens Clause. The more human rights norms and standards expand in scope the broader the application of the requirements of “the principles of humanity and the dictates of public conscience”. We therefore agree with the view that the Martens Clause reverses the classical assumption of international law. With regard to both HRsL and IHL, one cannot assume that everything that is not explicitly prohibited by law is allowed in practice.⁶

19. The enforcement of States’ obligation to prosecute IHL violators through the relevant human rights mechanisms undoubtedly enhances the effectiveness of IHL by providing the necessary deterrence to perpetrators of the worst forms of human rights violations committed in the significantly more dangerous context for civilians of armed conflict. In fact, the movement towards recognizing individual criminal responsibility for violations of *jus in bello* has not yet been accompanied by credible monitoring of States’ obligation to ensure that such individual responsibility is effectively legally sanctioned.

20. Within the same context of complementarity the issue of reparations for the victims of human rights violations is another important area in which human rights norms and instruments can greatly contribute to alleviate the suffering of victims of both HRsL and IHL violations, regardless of whether such violations have been committed in times of peace or during armed conflicts.

21. Another important area of growing convergence and complementarity of IHL and HRsL law is the increasing consideration of the Security Council of issues involving both IHL and HRsL violations that constitute threats to international peace and security. This fact led the Secretary-General to conclude in his latest reform proposals that “The High Commissioner for Human Rights must play a more active role in the deliberations of the Security Council and of the proposed Peacebuilding Commission, with emphasis on the implementation of relevant provisions in Security Council resolutions.”⁷

22. We certainly agree with this recommendation insofar as it emphasizes the relevance of ensuring respect for human rights as an important pillar of both conflict prevention and peace-building. This can only apply if the human rights violations are proved to have reached a scale that threatens international peace and security. In addition, the “more active role” for the High Commissioner for Human Rights in that field can only be exercised when and as required by the Security Council. The role of the High Commissioner in this highly sensitive area can only be fulfilled in a credible manner if it is based on the best possible use of all relevant

human rights treaty bodies and special procedures. Those mechanisms constitute the “humanitarian arsenal” of the High Commissioner, her “regular army” of protection, her institutional base and source of findings and legitimacy.

23. In other terms, if the High Commissioner is to play an increasing role regarding peace and security issues from a human rights perspective, monitoring observance of relevant IHL norms and standards should include her Office in a coordinated manner with the ICRC. The High Commissioner is not supposed to simply add political or moral weight to the deliberations of the Security Council, which she effectively enjoys by virtue of the Charter and the resolution establishing the Office. The added value of the contribution of the High Commissioner should be to inject a proper institutional human rights dimension into the debated issues, establish credible evidence provided by human rights mechanisms, suggest means of remedy from IHL and HRsL perspectives, and thus illustrate the human rights components of conflict resolution and peace-building on technically sound grounds.

III. PRECEDENTS AND ANALOGIES

24. Many studies dealt with the practice of human rights mechanisms in the field of IHL and numerous precedents have been analysed with a global outcome that indicates a growing trend towards covering IHL issues within the framework of a joint IHL and HRsL perspective. Approaches and methodologies in this respect vary according to the particularities of the situation in question.

25. The Security Council increasingly addresses IHL and HRsL jointly. The mandate of the Special Adviser to the Secretary-General on the Prevention of Genocide, working closely with the High Commissioner and the human rights special procedures, is an important precedent in this respect. The Security Council invited the Secretary-General “to refer to the Council information and analyses from within the United Nations system on cases of serious violations of international law, including international humanitarian law and human rights law and on potential conflict situations arising, inter alia, from ethnic, religious and territorial disputes, poverty and lack of development and expresses its determination to give serious consideration to such information and analyses regarding situations which it deems to represent a threat to international peace and security”.⁸

26. Security Council resolution 1591 (2005) concerning Darfur is another important precedent from which useful analogies can be drawn to serve the common objectives of both HRsL and IHL. In the resolution the Council not only addressed and monitored the responsibilities of the State of Sudan but also those of individuals, designated by a committee established under rule 28 of the Council’s provisional rules of procedure and based on information from different sources, who impede the peace process, constitute a threat to stability in Darfur and the region, commit violations of international humanitarian or human rights law or other atrocities.

27. In that light of this precedent, the obvious question is: What threshold of atrocities should trigger Security Council action, linking both sets of rules, to enforce IHL and human rights norms? Another problem immediately presents itself: even if we accept, for the sake of argument, that human suffering can be classified according to the scale of atrocities, it would still

be inadmissible that the international community, with its impressive array of human rights and international humanitarian law norms and standards, remain silent, inactive or inefficient in confronting the very early signs of what is likely to become massive human rights violations, in any part of the world. This is what we consider to be the missing link and a new right: the right to institutional protection; the right of victims of armed conflict to the full protection of all relevant institutions that can and should alleviate their suffering, directly or indirectly.

28. What needs to be done to ensure respect for human rights in all countries and all circumstances is to request relevant human rights mechanisms to monitor all cases of armed conflicts, of both national and international character, in order to detect and deter all possible violations of HRsL and IHL. We agree with Hans-Joachim Heintze, who observed that

“research shows that there is a convergence between the protection offered by human rights law and that of international humanitarian law. Both bodies of law can be applied in armed conflicts in order to achieve the greatest possible protection in the sense of Martens Clause. The most important practical consequence of this is the possibility to enforce international humanitarian law. As the implementation mechanisms of that law are insufficient and the elaboration of State reports and individual complaints procedures is not to be expected for it (sic) in the very near future, the existing human rights procedures gain in practical importance. Initial timid decisions in which international humanitarian law was applied have shown that: ‘In sum, although the practice of human rights bodies described above is still limited, it provides a welcome addition to the admittedly limited array of international means to enforce compliance with international humanitarian law by parties to armed conflicts. This clearly demonstrates the practical and useful consequences of the convergence of human rights law and international humanitarian law.’”⁹

29. Combating torture is another area of complementarity between HRsL and IHL. Acts of torture may occur in both times of peace and during armed conflicts. Both IHL and competent human rights mechanisms should coordinate their actions to ensure the most efficient possible protection to victims of torture. Both international humanitarian law and human rights law have made specific contribution to the struggle against torture. We agree with the view that “the present state of international law shows that together, humanitarian law and human rights instruments offer a comprehensive set of norms and procedures for the prevention, implementation and repression of acts of torture. Today, weakness in one area can most often be compensated by invoking instruments belonging to the other.”¹⁰

IV. CONCLUSION

30. Based on the above-mentioned considerations, the following questions and options need to be considered.

31. With the adoption of the Universal Declaration of Human Rights in 1948 the dignity of the individual human being became a central point of reference in the international legal system. This fact led to the construction of an international system of protection, both normative and institutional. This system keeps progressing despite ideological controversies, selectivity and politicization which are an integral part of human rights and humanitarian politics. Such negative factors should be counterbalanced by an enhanced role for treaty bodies, special

procedures, the Sub-Commission on the Promotion and Protection of Human Rights and NGOs, who can all influence human rights norms and standards more than any other branch of international law. Those defenders of the solemn promise of “never again” can and should support the increasing tendency for the two traditions, HRsL and IHL, to converge in a technically sound and practically useful and feasible manner. In most cases both sets of norms are applicable in parallel, but in some cases they can be applicable in a complementary way.¹¹ Two mutually supportive sets of norms can only enhance the protection of human rights in all circumstances, an objective which Professor George Abi-Saab qualifies as “the greatest conquest of post-war international law”.¹²

32. Pending further studies of the means of achieving this objective, a first step would be to recommend to the Commission that it request all its thematic special procedures, within their respective mandates, to pay attention to situations of actual or potential armed conflict and to include the relevant IHL issues in their consideration and reports. “As things stand today, it seems vital to make multiple use of the procedures that already exist. Since human rights law protection and international humanitarian law overlap, such a multiple use would appear possible.”¹³ It may be also useful to recommend to the Commission that it request all Member States in situations of armed conflict to extend standing invitations to thematic mandate holders, within their commitment to “respect and ensure respect” for the Fourth Geneva Convention “in all circumstances”, according to common article 1 of the Geneva Conventions.

33. Human rights treaty bodies may also be encouraged to examine the appropriateness of requesting from Member States additional reports especially addressing human rights in both internal tensions and international armed conflict situations. In all cases, the scope of any human rights mechanism dealing with IHL issues should be limited to the humanitarian component of the question under consideration and not include its political dimensions. This methodological and jurisdictional limitation is imperative to avoid politicization of IHL.

34. It may also be useful to consider recommending to the Commission that it request States parties to the four Geneva Conventions of 1949 to hold regular thematic meetings to review the specific problems of a general nature which affect the application of these conventions. The expert meeting held in Geneva to examine specific problems related to the application of the Fourth Geneva Convention in 1998 was a useful precedent in this respect. It was a thematic meeting not addressing any particular situation, and that is the way possible future meetings of this kind should be conducted. Relevant human rights special procedures should be invited to such periodic expert meetings to deepen understanding of and benefit from the exchange of experiences among the various actors and organizations involved in humanitarian work.

35. In order to deepen our understanding, under the auspices of the Commission on Human Rights, of the links between HRsL and IHL it may be useful to consider creating a working group of the Sub-Commission (probably in replacement of an existing working group which would be terminated for having fulfilled its purpose) in order to deal with the multidisciplinary questions arising from IHL in relation to human rights law and to serve as an advisory unit to enhance complementary and structured dialogue with Member States, the ICRC and NGOs to that end. In an expanding international community deprived of legislative authority and faced with existential challenges, such structured interdisciplinary debates are more important than ever.

36. Coordination and complementarity between human rights special procedures actions in relation to armed conflicts and the activities of the ICRC can be achieved through such structured dialogue. No change of the working methods of the ICRC would be required in this respect. There is no ambiguity as to the respective mandates of the various players and the international coordination of different perspectives of humanitarian action can only enhance its effectiveness. As stated by Mr. Sommaruga, former President of the ICRC in his keynote address to the twenty-sixth International Conference of the Red Cross and Red Crescent on 4 December 1995: “The growing magnitude of the task before us and the proliferation of agencies make it more necessary than ever to strengthen the process of consultation and cooperation among the various organizations involved in humanitarian work. Within the International Red Cross and Red Crescent Movement, it is the ICRC’s role to coordinate humanitarian operations in situations of armed conflict. Both with the components of the Movement and with its other partners in the field, the ICRC engages in this permanent consultation process in a spirit of openness, complementarity and solidarity, with due respect for each entity’s specific mandate.”

37. In the absence of a permanent IHL monitoring body, ad hoc international criminal courts as well as the ICC (in future), along with relevant United Nations organs and even some national courts play an important role in the interpretation of IHL norms. There is no structure at the international level to benefit from such important judicial contributions. It would therefore be useful to compile such judicial precedents and interpretations as an auxiliary source of soft law, a potential indicator of future customary norms and a practical tool to identify the “principles of humanity and requirements of public conscience”. Such process of progressive development of IHL can be enhanced through the establishment of the proposed Sub-Commission working group on human rights in armed conflicts. This is only one example of how such a forum can serve to address missing links between the IHL community and the human rights community and fill existing protection gaps. This new forum for consultation and dialogue should be an expert body which would only conduct thematic studies and formulate proposals through the Sub-Commission to the Commission on ways and means of enhancing institutional complementarity between two important sets of norms and instruments that converge in their focus on human dignity, while respecting their normative discrepancies and particularities.

PART TWO

Introduction

38. Part II of the present paper first clarifies the terminology before examining the history and nature of the two legal regimes. It then examines the simultaneous applicability of the two bodies of rules. As a separate but related issue, the paper considers the extent to which human rights law is applicable outside the national territory of a party to a conflict. Finally, it identifies particular issues which are likely to pose difficulties.

Terminology

39. Three different phrases are sometimes used to describe the rules which apply during periods of conflict: the laws of war, the law of armed conflict and international humanitarian law.¹⁴ In this working paper the acronym LOAC (law of armed conflict)/IHL will be used

to describe the totality of rules specifically applicable in situations of conflict. The rules regulate what occurs during conflict. They are quite separate from the rules which regulate the lawfulness of the resort to armed force. This paper does not address those rules at all. The rules applicable during conflict apply irrespective of the lawfulness of the resort to armed force.

40. This part of the report deals with human rights law, as opposed to human rights more generally. As such, it includes both human rights treaty law and rules established as a result of the work of Charter mechanisms. Most of the mechanisms have very specific mandates, as is the case with the special procedures.¹⁵ The Commission and the Sub-Commission, however, have very general mandates. In this document HRsL will be used to denote human rights law as defined above.

I. THE HISTORY AND NATURE OF LOAC/IHL AND HRsL

A. History of the legal regimes

41. The history of rules regulating conduct in conflict is significantly different from HRsL.¹⁶

42. This history of LOAC/IHL indicates:

- That this body of rules has very ancient origins;
- The extent to which at least international conflicts are regulated by treaty provisions;
- The relatively recent recognition that there is a significant body of customary law on non-international conflicts;
- The willingness of States to extend the applicability of LOAC/IHL treaties, apart from provisions dealing with the status of the fighters, to non-international conflicts; and
- Until recently, the relative lack of enforcement machinery, other than through domestic criminal law.

43. Norms of what, at the international level, is usually understood by HRsL started at the domestic level. It was sometimes part of the ordinary law of the land, as in the case of habeas corpus in England, and sometimes part of a constitutional settlement, as in the case of the Declaration of the Rights of Man and of the Citizen in France. There is no doubt that the most important step in the development of international HRsL occurred with the inclusion of human rights in the Charter of the United Nations, including the reference to a Commission on Human Rights, and the adoption of the Universal Declaration of Human Rights. The period since 1945 has seen the elaboration of a variety of human rights treaties at the regional and international levels. The Commission on Human Rights has played a vital role in the development of other mechanisms, such as thematic and country rapporteurs and working groups.

44. The most striking features of HRsL, as compared to LOAC/IHL include:
- Its relative youth, at the international level;
 - The development of machinery for monitoring and/or enforcing the norms, alongside the development of substantive norms; and
 - The development of mechanisms with jurisdiction over all States Members of the United Nations and not just over States that ratify treaties.

B. Nature of the legal regimes

45. The ultimate object of the two legal regimes is broadly similar, but they seek to attain that object in radically different ways. It would probably not be possible to merge the two bodies of rules; nor would it be desirable, on account of the loss of the advantages of legal regimes specifically designed for their particular purposes. Whilst both regimes seek to avoid unnecessary deaths, injuries and destruction, the starting point of LOAC/IHL is the soldier's right to kill.¹⁷ The starting point of HRsL is the prohibition of arbitrary killing and the obligation to protect the right to life.¹⁸ The different legal nature of the two regimes is reflected in a range of important legal differences which it is easy to overlook.

46. HRsL is fundamentally civil, as opposed to criminal, in character. It consists of obligations of States, to which effect should be given in the constitution, domestic laws, regulations, practices and policies.¹⁹ The focus is on the relationship between the victim and the State, not the perpetrator.

47. At the inter-State level, LOAC/IHL can be enforced as civil international law obligations, for example before the International Court of Justice.²⁰ The provisions of the treaties themselves and the content and nature of the substantive norms make it very clear that enforcement is principally intended to be by means of domestic criminal law, the domestic criminal law of third States and international criminal law.²¹ The focus is on the violation and the perpetrator, not the victim. Criminal law includes both military and civil criminal law. It is therefore not the case that machinery does not exist for the enforcement of LOAC/IHL. It is rather that it has not often been used.

48. The fundamental difference between civil and criminal proceedings is also reflected in the rules of procedure and the rules of evidence usually applicable, and in the burden and standard of proof.

49. Whilst LOAC/IHL makes provision for inter-State claims for compensation, there is no express provision for individual claims. There is, however, nothing in LOAC/IHL which precludes them.²² It is likely that one of the reasons why increasing use is being made of the right of individual petition in HRsL by applicants complaining of violations of HRsL which are also violations of LOAC/IHL is because they have no effective alternative means of redress for the latter.²³ This issue has been addressed by the Statute of the International Criminal Court.²⁴ It remains to be seen how it will work in practice.

50. It is clear that, whilst the two legal regimes may take significantly different forms, they address a similar range of concerns and are complementary. This has been confirmed by the Commission, which, in resolution 2005/63, stated that human rights law and humanitarian law are complementary and mutually reinforcing and that “the protection provided by human rights law continues in armed conflict situations, taking into account when international humanitarian law applies as a *lex specialis*”, and, in the first paragraph, emphasized “that conduct that violates international humanitarian law ... may also constitute a gross violation of human rights”. It is therefore necessary to consider the applicability of the two legal regimes in order to determine whether there are circumstances in which both bodies of rules are applicable.

II. APPLICABILITY OF HRsL AND LOAC/IHL

51. Whether or not there is a practical, as opposed to an academic, issue concerning the relationship between the two legal regimes depends on the answers to be given to two questions. The first is whether HRsL and LOAC/IHL are mutually exclusive. The second question, which is related to but distinct from the second, is the extent to which the State has human rights obligations outside national territory. That will be dealt with separately.

52. Historically, the first question was controversial, at least in academic circles. In the 1970s, there was a considerable amount of academic literature on the question. Those from a LOAC/IHL background tended to argue that HRsL was only applicable in peacetime and that LOAC/IHL was the only body of rules applicable in situations of conflict.²⁵ Those from a human rights background were more likely to consider that HRsL remained applicable in all circumstances, albeit in a modified way.²⁶

53. The question achieved real practical importance as human rights bodies, particularly those dealing with individual complaints, had to address alleged violations which had occurred in situations of conflict and which were directly related to the conflict. Rather than examining the question in the light of the chronological development of the case law, the analysis will be structured on an institutional basis.

54. There would appear to be three theoretical possibilities: (i) the applicability of LOAC/IHL as a matter of law displaces the applicability of HRsL; (ii) the applicability of LOAC/IHL as a matter of law has absolutely no effect on the applicability and application of HRsL or, in between the two; (iii) each body of law remains applicable and each must take account of the other.

55. The focus of concern here is the applicability of HRsL in situations of conflict. It should nevertheless be remembered that bodies primarily applying LOAC/IHL, such as the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the ICRC, may also need to consider the continued applicability of HRsL.²⁷ Complementarity works both ways.

56. From 1968 and the adoption by the General Assembly of resolution 2444 (XXIII) on respect for human rights in armed conflict, General Assembly resolutions have repeatedly used the language of human rights in resolutions dealing with conflict situations.²⁸ In recent years,

the Security Council has increasingly referred to both human rights and international humanitarian law in situations of conflict.²⁹ That might be thought to indicate political acceptance of the fact that both legal regimes may be applicable in the same situation.

57. The International Court of Justice has addressed the issue twice, first in the Advisory Opinion on the Legality or Threat of Use of Nuclear Weapons³⁰ and, more recently, in the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.³¹ In the latter case, the Court addressed expressly the legal regimes applicable in the situation before it. The Court confirmed the *de jure* applicability of the Fourth Geneva Convention and then considered the applicability of HRsL.

“More generally, the Court considers 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. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”³²

It is clear that *lex specialis* is not being used to displace HRsL. It is rather an indication that human rights bodies should interpret a human rights norm in the light of LOAC/IHL.

International treaty bodies

58. The international treaty bodies have themselves had to consider the issue. For reasons of space, it will only be possible to analyse the comments of the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (CESCR). It should be noted, however, that other treaty bodies have also had to address the question, directly or indirectly.³³

59. In reaching its Opinion, the Court relied on and endorsed the current practice of the HRC. The relationship between HRsL and LOAC/IHL has often arisen in the context of derogation.

60. In 2001, the Human Rights Committee adopted general comment No. 29 (2001) on derogations during a state of emergency.³⁴ The Human Rights Committee first made it clear that the Covenant can be applicable in situations in which the law of armed conflict is applicable.³⁵ It then went on to explain its competence with regard to other legal regimes which might be applicable alongside the Covenant.³⁶

61. The Committee also suggests that when examining the necessity for a particular measure in derogation of the Covenant, it can take the law of armed conflict into account.³⁷ This still does not explain how the Committee will interpret an action or measure which is consistent with the law of armed conflict but arguably in violation of human rights law. The most significant issues in this regard are the non-derogable prohibition of arbitrary killing (art. 6) and the potentially derogable prohibition of arbitrary detention (art. 9). As far as the rights of a detained person are concerned, the Committee is of the view that they play a vital role in relation to the

non-derogable prohibition of torture, cruel, inhuman or degrading treatment or punishment. As a result, the Committee regards particular elements of the potentially derogable article 9 as being, in effect, non-derogable.³⁸ The general comment gives an example of the operation of such a principle.³⁹

62. The general comment expressly envisages the use of the law of armed conflict for two purposes: to determine whether a State is prohibited from introducing a particular measure and to determine the necessity of a measure which a State wishes to adopt in a situation of emergency. In both cases, the effect is to ensure conformity with the law of armed conflict. The general comment suggests that the Human Rights Committee can address any alleged human rights violation within its jurisdiction, even in situations of armed conflict. It does not explain to what extent it might use the law of armed conflict in interpreting the scope of a substantive obligation; for example, to determine what constitutes an arbitrary killing. It is submitted that the Advisory Opinion of the International Court of Justice would require the HRC to take LOAC/IHL into account when determining that a killing was arbitrary in circumstances in which LOAC/IHL was applicable. That principle would apply even in non-international armed conflicts.

63. CESCR is clearly of the view that States are accountable for such policies, even in situations where LOAC/IHL is applicable, since it has sought to call Israel to account for policies in the Occupied Territories.⁴⁰ It is equally clear that Israel asserts that, where LOAC/IHL is applicable, it displaces the applicability of HRsL.

International special procedures

64. Many of the mandates relate to problems which arise in situations of conflict, such as torture; summary, arbitrary and extrajudicial executions; arbitrary detention; internally displaced persons and disappearances. Country mandates include or have included Afghanistan, Iraq, the Sudan, Somalia, Liberia and the Palestinian Territories occupied since 1967. The reports of those holding country mandates in situations of conflict and General Assembly resolutions referring to those mandates have routinely referred to both human rights law and the law of armed conflict, usually in fairly general terms.⁴¹

65. It is often the case that mandate-holders can report an allegation and the Government's explanation but cannot reach a conclusion because the facts are disputed. One special procedure is, however, different in this regard. The nature of its mandate means that it can reach conclusions because the alleged violation concerns the application of a law the existence of which cannot be disputed. The special procedure in question is the Working Group on Arbitrary Detention.

66. In its report for 2002, the Working Group set out its general opinion with regard to detention in Guantánamo Bay (see E/CN.4/2003/8).⁴² It stated that there was a doubt as to the status of the detainees which could only be determined by a tribunal as envisaged by article 5 of the Third Geneva Convention and not by means of an executive decision. In other words, the Working Group used LOAC/IHL. If a tribunal were to determine that an individual was not entitled to prisoner of war (PoW) status, the individual would be protected under the International Covenant on Civil and Political Rights, notably articles 9 and 14.⁴³ The Working Group expressly stated that it was not competent to determine whether a detainee was

entitled to PoW status. The opinion does not indicate, first, whether the provisions of the Covenant are relevant in interpreting the Third Geneva Convention (e.g. the characteristics of a “competent tribunal” under article 5 of the Third Geneva Convention), nor whether the Working Group would have a mandate to ensure that detention complied with the Convention, insofar as it displaces the applicability of the Covenant.

67. The United States responded (E/CN.4/2003/8/Add.1).⁴⁴ It first stated that the Working Group did not have a mandate to deal with law of war issues. The reply did not examine the possible applicability of HRsL to detainees not protected by LOAC/IHL. The United States simply asserted that the situation was one to which LOAC/IHL was applicable, even if the detainees were not protected under that body of rules, and that therefore human rights law was not applicable.

68. Subsequently, the Working Group had to consider the case of four detainees in Guantánamo Bay.⁴⁵ The Working Group found their detention to be in breach of the Universal Declaration of Human Rights and article 9 of ICCPR.⁴⁶ This suggests that detainees who are not protected by the Third Geneva Convention will be protected by human rights law.

69. It therefore appears that, whilst two States (Israel and the United States) take the position that where the law of armed conflicts is applicable then human rights law is not applicable, the International Court of Justice, the international treaty bodies and the international special procedures do not take the position that it is a question of “either ... or”. Where the law of armed conflicts is applicable, human rights law may also be applicable, particularly where individuals are not receiving the protection afforded by the former body of rules. Most States, to judge by their responses to treaty bodies and special procedures, do not take a straightforward “either ... or” position but may dispute the applicability of HRsL in particular situations.

70. It is necessary to consider whether Israel and the United States can rely on the persistent objector principle to claim that, at least as far as they are concerned, the applicability of LOAC/IHL displaces that of HRsL. There is first the difficulty of determining whether the doctrine can be applied in the field of HRsL. There are other examples where the applicability of the usual rule of international law may be modified in the case of treaties of a humanitarian character.⁴⁷ More fundamentally, there is a grave doubt as to the persistence of their objection.⁴⁸ Neither Israel nor the United States made any reservation or declaration expressly excluding the applicability of HRsL where LOAC/IHL is applicable. One would expect to find not only reservations at ratification but also objections to general comments which directly or indirectly deal with the issue. That is particularly true of the United States, which criticized general comment No. 24 but has submitted no observations on general comments Nos. 29 and 31. Furthermore, instructions to the armed forces of a State containing references to the applicability of HRsL do not appear to be consistent with persistent objection. Even if the doctrine were thought to be applicable, it would not apply to those provisions of HRsL which have acquired the status of *ius cogens*.

Regional treaty bodies

71. For reasons of space, it is only possible to address the case law of two of the regional bodies and even then in the most cursory fashion.⁴⁹ The Inter-American Commission and Court of Human Rights have jurisdiction under the American Convention on Human Rights.⁵⁰

In addition, the Inter-American Commission has jurisdiction under the Charter of the Organization of American States (OAS) and the American Declaration on Human Rights.⁵¹ The Commission has produced country reports, many of which have related to situations of conflict. The Court has delivered two advisory opinions relevant to situations of conflict.⁵² In this context, the most important three cases brought under the Convention are the *Abella* case,⁵³ the *Las Palmeras* case⁵⁴ and the *Bámaca Velásquez* case.⁵⁵ The Inter-American Commission has shown a willingness explicitly to apply the applicable rules of LOAC/IHL. The Court has ruled that the relevant provisions of the Geneva Conventions may be taken into consideration when interpreting the American Convention but the Commission and Court can only find a violation of HRsL and not of LOAC/IHL.⁵⁶ That appears to suggest that LOAC/IHL will be the basis for analysis of a Convention right and will not merely be used to confirm an analysis based on HRsL.

72. The former European Commission and former and current European Court of Human Rights (ECHR) have had to address alleged violations of the European Convention on Human Rights arising in situations of international armed conflict,⁵⁷ high-intensity non-international armed conflict⁵⁸ and in situations in which it was at least arguable that common article 3 of the Geneva Conventions was applicable.⁵⁹ In addition, the Court currently has before it cases arising out of peace support operations. The Court has never referred to the applicability of LOAC/IHL. It has, on occasion, stated that it is aware of the situation in which the Convention is being applied but has done so in the context of applying HRsL.⁶⁰ Nevertheless, in certain cases, it is possible to detect that there is an awareness of the type of analysis that would be conducted under LOAC/IHL.⁶¹ There is a reason particular to the European Convention why LOAC/IHL needs to be taken into account. The provisions dealing with unlawful killings and unlawful detention are drafted differently in articles 6 and 9 of ICCPR. The ECHR lists exhaustively the only grounds upon which resort may be made to potentially lethal force and the only grounds upon which a person may be detained. In these circumstances, ridiculous results flow from a failure to recognize the applicability of LOAC/IHL, at least where the State has not derogated.⁶²

73. The analysis so far has assumed that LOAC/IHL is applicable. Whilst in many situations it is clear both that it is applicable and which parts of it are applicable, that is not always the case. Different rules apply depending on whether the situation is an international armed conflict, a high-intensity non-international conflict or an armed conflict not of an international character.⁶³ There are two different types of problem in establishing the applicability of LOAC/IHL. The first is essentially political. Particularly in situations of internal conflict, States are often unwilling to acknowledge the applicability of common article 3 of the Geneva Conventions general comment No. 29 suggests that the HRC is aware of the problem.⁶⁴

74. The second type of difficulty is more fundamental. There may be legal reasons for disputing the applicability of LOAC/IHL. That is most likely to arise at the minimum threshold for the applicability of common article 3 and on the borderline between the applicability of that article and Protocol II Additional to the Geneva Conventions. There are other situations in which difficulties arise, as for example in determining when the conflict in Afghanistan shifted from being international to non-international.⁶⁵

75. There exists no body which addresses the characterization of a conflict and the applicability of LOAC/IHL at the time of the fighting. Whilst generally it will be clear to a treaty body or a special procedure whether LOAC/IHL is applicable and whether it should be applied as the *lex specialis*, there may be some situations in which that is more difficult to determine.

76. The case law strongly suggests that:

- HRsL, subject to possible derogation, remains applicable in situations in which LOAC/IHL is applicable;
- In situations of conflict, particularly situations arising on the battlefield, human rights bodies should interpret the norms of HRsL in the light of LOAC/IHL, as the *lex specialis*;
- Difficulties are likely to arise if a human rights body fails to take LOAC/IHL into account;
- It appears unlikely that the persistent objector principle is applicable, either in principle or on the facts; and
- Members of treaty bodies and those relevant special procedures should either have training in LOAC/IHL if they think they need it or should have LOAC/IHL expertise available to them.⁶⁶

77. In relation to the simultaneous applicability of LOAC/IHL, there is no basis in principle for drawing a distinction between internal and international conflicts. Either the applicability of LOAC/IHL displaces that of HRsL or it does not. The overwhelming evidence is that it does not. A difference between international and non-international conflicts could, however, be the effect of the answer to the next question. If it were the case that human rights obligations only bind a State within national territory, then the only circumstances in which both LOAC/IHL and HRsL might be applicable would be, first, internal conflicts and, second, in relation to action within national territory during an international armed conflict.

III. EXTRATERRITORIAL APPLICABILITY OF HRsL

78. In many cases, the potential overlap between HRsL and LOAC/IHL occurs in situations in which the conflict occurs in national territory. The issue of the extraterritorial applicability of HRsL does not arise. There are other cases, however, where the armed forces of a State allegedly violate HRsL outside national territory. They could be engaged in an international or non-international armed conflict, present as part of a peace support operation or present, with the consent of the host State, on a temporary or permanent basis. In other words, the issue of the extraterritorial applicability of HRsL includes but is not limited to situations of conflict. It is not even limited to the armed forces. Other State agents, such as diplomatic personnel, may take action outside national territory which allegedly violates HRsL.

79. Three separate arguments are made by those who dispute the applicability of HRsL outside national territory. The first is that HRsL was designed only to apply to the relationship between a State and its citizens.⁶⁷ The difficulty with that argument is that it is clear that foreigners within national territory are protected under HRsL.⁶⁸ It is then suggested that there are other ways in international law to protect foreign nationals from the extraterritorial acts of a State.⁶⁹ If, however, HRsL applies to foreigners within national territory, that suggests that their foreign character is not in itself a reason for depriving them of the protection of HRsL. Others suggest that the particular context in which HRsL is applicable is the nature of the control exercised by a State in its territory and over individuals or the population as a whole. If, however, it exercises control of the same or a similar nature outside national territory, there is no ground for making a distinction on that basis.

80. The second argument concerns the implications of the fact that States have not derogated from HRsL when engaged in extraterritorial military operations.⁷⁰ It is suggested that this indicates that States do not expect their HRsL obligations to be applicable extraterritorially. There are two objections to that argument. First, the fact that they have not derogated does not mean that they are not required to do so, if they wish to obtain the benefit. In the only case in which the issue has arisen directly, the European Commission on Human Rights found that the Convention was applicable outside national territory and that it applied in its entirety, the State having failed to derogate.⁷¹ Second, States have not generally objected to extraterritorial applicability outside the military sphere, for example in the case of acts of diplomatic personnel or detentions effected by State agents.⁷²

81. The third argument concerns not the general principle of applicability but the circumstances in which HRsL might be applicable extraterritorially. It is submitted that there is no basis in law or practice for suggesting that HRsL is not in principle applicable outside national territory, but there are questions as to the circumstances in which and the extent to which HRsL is applicable in such circumstances.⁷³

82. Most human rights treaties contain a provision according to which States undertake to secure the protection of the rights in question to those within their jurisdiction. The precise formulation varies.⁷⁴ The issue, therefore, is when is a person “within the jurisdiction” of a State, notwithstanding that the act complained of occurred outside national territory? Jurisdiction involves the assertion of authority, *de facto* or *de jure*. Authority may be legislative, judicial or executive. In general comment No. 31 (2004), the HRC stated, “... 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”.⁷⁵ The case law can be examined in the light of three criteria: territorial control, control over the person of the applicant and control over the infliction of the alleged violation. It is important to emphasize that, even when a case factually comes within one category, that may not be the basis for the decision of the human rights body.

Territorial control

83. Territorial control can take the form of military occupation, control without occupation or temporary control. In a situation of military occupation, a State is in a position to secure human rights in the same way as in national territory.⁷⁶ The HRC and the ECHR have indicated that the

occupying Power is responsible for the protection of human rights in the occupied territory.⁷⁷ The ECHR has made it clear that the responsibility of the State extends not only to the acts of its own agents but to all officials, as would be the case in national territory. It is not clear whether the basis of the HRC's view is that individuals are within the jurisdiction of the occupying Power, or that human rights protection comes within the responsibility of the occupying Power under the law of State responsibility.⁷⁸

84. The ECHR has also recognized the responsibility of a State which plays an important role in the affairs of an unrecognized entity but which might not be regarded as in occupation under LOAC/IHL. In the case of *Ilascu and others*, it held Russia responsible for the acts of its armed forces in Transdnistria.⁷⁹ In the case of *Issa and others v. Turkey*, the ECHR went one step further and envisaged the possibility of temporary control of territory.⁸⁰

85. There may be an issue of territorial control where the armed forces of a State are given responsibility for a particular sector in a peace support operation.⁸¹

Control over the person of an applicant

86. There is consistent case law from human rights bodies that a person is within the jurisdiction of a State when he/she is detained by agents of that State outside national territory. They emphasize the control exercised by the State over the detainee, but that is not necessarily the basis of the decision. So, for example, in the *López Burgos* case, the HRC found that the applicant's husband was within the jurisdiction of Uruguay when he was tortured, originally in Argentina, by Uruguayan security forces.⁸² The Inter-American Commission on Human Rights has had to address a similar issue in relation to persons detained by United States forces during the intervention in Grenada. In *Coard and others*, the Commission held that the test was whether a person is subject to the authority and control of a State.⁸³ A similar test has been used in relation to the detainees in Guantánamo Bay.⁸⁴ The United States objected to the exercise of jurisdiction by the Commission because it claimed that the situation was regulated by LOAC/IHL. Similarly, the ECHR found that Oçalan, the PKK leader, was within the jurisdiction of Turkey as soon as he was in the control of Turkish security forces in Kenya.⁸⁵

87. The basis of the analysis of the HRC was not the fact of detention.

“The reference in article 1 of the Optional Protocol to ‘individuals subject to its jurisdiction’ ... is not to the place where the violation occurred, but rather to the relationship between the individual and the State *in relation to a violation* of any of the rights set forth in the Covenant, wherever they occurred” (emphasis added).⁸⁶

The cases so far considered involve victims who were in a place of detention. The ECHR gave detention a wider meaning in the case of *Issa and others v. Turkey*.⁸⁷ The relatives of the applicants were allegedly being moved around under the exclusive control of Turkish soldiers.

88. In the detention cases, the victim has been found to be within the jurisdiction in relation to violations associated with detention, such as alleged unlawful detention or alleged ill-treatment. An individual may be within the jurisdiction of one State for some purposes and of another for other purposes. Jurisdiction is not an all or nothing affair.⁸⁸

Control over the infliction of the alleged violation

89. There are cases in which human rights bodies have found victims to be within the jurisdiction but which cannot be explained on the grounds so far examined. Two of the cases are decisions of the Inter-American Commission. The first involved deaths resulting from the alleged bombardment of a mental hospital during the United States intervention in Grenada.⁸⁹ The second concerned deaths and injuries resulting from allegedly indiscriminate and reckless firing during the United States operation in Panama.⁹⁰ Whilst there is no jurisdictional clause under the American Declaration, and the United States had not raised the issue of extraterritoriality, the Commission did so *proprio motu*. The Commission found that it had the competence to address the issue.

90. The European cases have principally concerned the acts of diplomatic personnel. The cases did not concern the responsibility of a State for acts occurring in diplomatic premises. The former Commission found that the control exercised by a State agent over an act or decision said to violate the rights of the applicant was sufficient to bring the applicant within the jurisdiction of the State.⁹¹ It may be that the original admissibility decision in *Issa* is better understood as the application of such a principle. It is not clear whether the admissibility decision in *Varnava and others* is based on detention or on some other ground.⁹²

91. The one way in which these cases can be reconciled is by the analysis of the HRC in the *López Burgos* case.⁹³ In other words, what determines whether an applicant is within the jurisdiction of a State is the relationship between the individual, agents of the State and the act said to constitute the violation. If the State controls the infliction of the alleged violation and if it was or should have been foreseen that the applicant would be a victim of the act, the applicant is within the jurisdiction.⁹⁴

92. It is submitted that it is clear that:

- In certain circumstances, a State may be responsible under HRsL for the acts and omissions of State agents outside national territory;
- In a territory subject to military occupation, a State is responsible for the acts of all officials and not just its own personnel;
- In other circumstances, a State is only responsible for the acts and omissions of State agents where they control the infliction of the alleged violation and where it was or should have been foreseen that the victim would be adversely affected by the act or omission.

It should be noted that just because HRsL is applicable does not mean that it has been violated. Further, it has been suggested that where LOAC/IHL is applicable, HRsL has to be interpreted in the light of the other applicable rules.

IV. FURTHER ISSUES

93. There are a variety of particular issues which cannot be addressed within the constraints of this working paper but which may be thought worthy of further study. They are all issues involving the application, as opposed to the applicability, of HRsL in circumstances in which LOAC/IHL is also applicable. They include:

- (a) The prohibition of arbitrary killings and the protection of the right to life:
 - (i) The circumstances in which an individual can be targeted;
 - (ii) The precautions that need to be taken in the planning of an attack;
 - (iii) The relationship between the principle of proportionality in HRsL and the prohibition of indiscriminate attacks and attacks likely to cause disproportionate harm to civilians under LOAC/IHL;
 - (iv) The extent to which the obligation to carry out an effective investigation into killings and the scope of the obligation in circumstances in which LOAC/IHL is applicable;
- (b) The prohibition of torture, cruel, inhuman or degrading treatment or punishment:
 - (i) The extent to which methods of warfare, weapons and practices may give rise to inhuman treatment;⁹⁵
 - (ii) The extent to which collective penalties, prohibited under LOAC/IHL, could be said to constitute cruel or inhuman punishment;
- (c) Disappearances and the missing in war: whether there is a relationship between the LOAC/IHL obligations relating to the missing in war and the obligation under HRsL to prevent, put an end to and investigate disappearances;
- (d) Detention: the extent to which the HRsL obligations relating to detention, such as the right to habeas corpus and the right to counsel, are applicable to the circumstances of detention under LOAC/IHL;
- (e) Access to medical care: the relationship between the detailed provisions of LOAC/IHL regarding access to medical care and the protection of medical personnel and HRsL;
- (f) The right to a remedy: whether the right to a remedy remains applicable in situations of conflict and the implications;

Other possible issues include:

- (g) Implementation:
 - (i) Of measures designed to prevent violations;
 - (ii) Of measures to enforce the rules, after the event;
- (h) Institutions:
 - (i) NGOs and situations of conflict;
 - (ii) The OHCHR and IHL/LOAC;
 - (iii) Other institutional issues.

94. There are no doubt other issues which could be added.

Notes

¹ A/59/2005, 21 March, 2005, paragraph 129.

² Ibid.

³ Rosemary Abi-Saab, *Human Rights and Humanitarian Law in Internal Conflicts*. D. Warner (ed) *Human Rights and Humanitarian Law*, 1997. Kluwer Law International, pp. 122-123.

⁴ Hans-Hoachim Heintze, *On the relationship between human rights law protection and international humanitarian law*, ICRC. December 2004, Vol. 86, No. 856, p. 798.

⁵ John Dugard, *Bridging the gap between HRsL and humanitarian law. The punishment of offender*. *International review of the Red Cross*, No. 423, p. 445 – 453.

⁶ Louise Doswald-Beck, *International and humanitarian law and the Advisory Opinion of the ICJ on the legality of the threat or use of nuclear weapons*, ICRC, *International Review of the Red Cross* no 316, p 41.

⁷ A/59/2005, paragraph 144.

⁸ S/2004/567, S/RES/1366 (2001) op 10.

⁹ Hans-Joachim Heintze, *Ibid*, pp. 812,813.

¹⁰ Walter Kälin, *The struggle against torture*, *International Review of the Red Cross*, No.324,p. 436.

¹¹ As stated by H.J. Heintze “Some obligations in HRsL treaties remain in force during armed conflicts. The result is undoubtedly a substantial overlap of both bodies of law. However, the response of legal opinion to this situation differs. Some authors argue against “advocating a merger of the two bodies of international law” and speak of the theory of complementarity. According to this theory, HRsL law and IHL are not identical bodies of law but complement each other and ultimately remain distinct. This is undoubtedly true, but the point is that they do overlap”, *ibid* p. 794.

¹² George Abi-Saab, *Whither the International Community?* *European Journal of International Law* 9, 1998, p. 262 .

¹³ Hans-Joachim Heintze, *Ibid*, p. 799.

¹⁴ The “laws of war” has generally fallen disuse. The phrase runs the risk of giving the impression that the rules only apply where war has been declared. “War” is a technical legal term. It is of significance in a domestic legal context. A declaration of war may have the effect of triggering the applicability of certain legislation E.g. rules on trading with the enemy; it may also have an effect on certain clauses in insurance contracts. See generally, McNair & Watts, *The Legal Effects of War*, CUP, 4th Ed., 1966. The international rules are, however, applicable by virtue of the existence of an armed conflict, whether or not war has been declared; Geneva Conventions of 1949, common Article 2; Protocol I of 1977, Article 1.3. Historically, “international humanitarian law” was used to describe the rules on the protection of the victims of war, as opposed to the rules on the conduct of hostilities. Since 1977, when Protocol I to the Geneva Conventions of 1949 addressed both means and methods of warfare and rules on the protection of victims, many commentators have used “international humanitarian law” to include both the rules on the conduct of hostilities and those on the protection of victims. That is the practice of the ICJ, as evidenced for example, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment of 27 June 1986 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004 and of the International Committee of the Red Cross (ICRC). Others, including many armed forces, prefer the term the law of armed conflict to apply to both bodies of rules; E.g. UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, OUP 2004.

¹⁵ Special Procedures refer to any individual or body addressing a human rights issue which report to the Commission on Human Rights. They include Special Rapporteurs (thematic and country), Working Groups, Independent Experts and Representatives of the Secretary-General. The manner of their appointment is not relevant for these purposes.

¹⁶ Rules the function or purpose of which was to regulate the conduct of fighting go back a very long way. They start with the code of Sun Tzu, which is over 2,400 years old; Sun Tzu, *On the Art of War*; <http://www.kimsoft.com/polwar.htm>. Every ancient religion, including the three major monotheistic religions, contains principles restricting the conduct of war, for example by limiting the legitimate targets of attack. In the Middle Ages, principles of chivalry also contributed to the development of rules. In other words, the origin of the rules predates the development of the sovereign State. It should also be noted that many societies where conduct is

subject to customary law also have rules regulating the conduct of hostilities; E.g. ICRC, *Spared from the Spear* – relating to Somalia. From the middle of the nineteenth century there has been the development of treaty law, in spasmodic bursts. The Russian authorities, led by the Tsar, played a vital role in the formulation of treaties dealing with the means and methods of warfare; E.g. the Declaration of St Petersburg 1868; for all treaties, see the web-site of the ICRC: www.icrc.org. At the domestic level, a code which was to serve as a model for other States was issued under the orders of President Lincoln during the American Civil War. It is known by the name of its author – the Lieber Code; *Instructions for the Government of Armies of the United States in the Field*, 24 April 1863. At around the same time, the ICRC was established, as a private association under Swiss law. It acted as a catalyst for the creation of treaties dealing with the protection of victims of war, in other words the wounded and sick, the shipwrecked and prisoners of war. The treaty-making culminated in a series of consolidating and up-dating treaties in 1899 and 1907. There was very limited development in treaty law between 1907 and 1939, notwithstanding significant changes in technology, such as aircraft and submarines. Texts were agreed, such as *Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare*. Drafted by a Commission of Jurists at the Hague, December 1922 - February 1923 and a *Treaty for the Limitation and Reduction of Naval Armaments*, (Part IV, Art. 22, relating to submarine warfare). London, 22 April 1930; these texts were not in force during World War II. One significant text adopted in that period was the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. There were also further consolidating and up-dating treaties on the wounded and sick and prisoners of war, which appear to have made a significant difference on the western front of the European theatre of war in World War II. The judgment of the Nuremberg Tribunal, together with judgments adopted under Control Council Law No.10 in occupied Germany and those of the Tribunals in the Far East, helped to clarify the rules as they were in 1945. The principles affirmed in the Charter of the Nuremberg Tribunal were endorsed by the General Assembly; *Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal*. Resolution 95 (I) of the United Nations General Assembly, 11 December 1946. In 1949, again under the aegis of the ICRC, the four Geneva Conventions were adopted. The first three, which dealt with the wounded and sick, the shipwrecked and prisoners of war, consolidated and up-dated the previous law, in the light of recent experience. The fourth, the need for which had again been made clear during World War II, dealt with civilians in the power of an opposing belligerent and civilians in occupied territory. Convention (IV) respecting the Laws and Customs of War on Land and its annex: *Regulations concerning the Laws and Customs of War on Land*. The Hague, 18 October 1907 contained some provisions on occupation but those dealing with the relations between the occupying power and the civilian population were very rudimentary. The fourth Geneva Convention contains some provisions, in Part II, of application to civilian populations generally and principally concerning access to medical care; the bulk of the provisions, however, deal with civilians in the power of the other side. Until 1977, there had been no successful attempt to up-date the rules on the conduct of hostilities generally. This may have been partly attributable to the reluctance, after both the first and second world wars, to regulate a phenomenon which the League of Nations and later the United Nations were intended to eliminate or control. During this time the Hague Convention for the Protection of Cultural Property in the event of armed conflict was concluded. In 1977 two Protocols to the Geneva Conventions of 1949 were adopted. Protocol I dealt with

international armed conflicts. It up-dated provisions on the wounded and sick and, most importantly, formulated rules on the conduct of hostilities. The Protocol deals with the effects on land of land, aerial and naval warfare but does not otherwise address naval warfare. That area of law formed the object of study by a group of governmental experts and academics and resulted in the publication of International Institute of Humanitarian Law (Louise Doswald-Beck, ed.), San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Grotius Publications, CUP, 1995. Protocol II addressed high-intensity non-international armed conflicts and developed common Article 3 of the Geneva Conventions of 1949, the first treaty provision to address conflicts not of an international character. In 1980 a convention on certain conventional weapons was adopted. It is usually known as the CCW. Its full title is 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. The most recent addition to the protocols addresses explosive remnants of war. The Convention was essentially an umbrella, under which sheltered Protocols on certain specific conventional weapons. Since 1990 there have been developments in treaty law and outside that framework. The former include further protocols to the CCW, the modification of the treaty itself to apply in situations both of international and non-international conflict, the Ottawa Convention on anti-personnel mines of 1997, a second protocol to the Hague Convention on Cultural Property, making the Convention applicable in situations of non-international conflict and the adoption of the Statute of the International Criminal Court. It is not enough that treaties are concluded if they are not then ratified. The four Geneva Conventions of 1949 have achieved nearly universal ratification. Protocol I of 1977 has been ratified by over 160 States and Protocol II by nearly 160 States. Nearly 100 States are parties to the 1980 CCW. Mere numbers are not necessarily significant. The Protocols have been ratified by certain specially affected States, such as France, the Russian Federation and the UK but not ratified by others, such as Iran, Iraq, the PRC and the USA. It is also necessary to remember that ratification is not necessarily accompanied by implementation, in law or in practice. Outside the treaty-making framework, the most important development has been the case-law generated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which have provided a model for other bodies, such as the Special Court in Sierra Leone. Finally, 2005 has seen the publication of the ICRC study on customary IHL; Henckaerts & Doswald-Beck, Customary International Humanitarian Law, 2 vols., CUP, 2005. The ICRC was mandated to produce the study by a resolution of the 26th International Conference of the Red Cross and Red Crescent in 1995. Weapons of mass destruction, such as chemical, biological and nuclear weapons, are dealt with not as LOAC/IHL issues but are the subject of negotiation in the UN disarmament process.

¹⁷ E.g. “Members of the armed forces of a Party to a conflict ... are combatants, that is to say, they have the *right* to participate directly in hostilities.”; Protocol I, Article 43.2 (emphasis added).

¹⁸ International Covenant on Civil and Political Rights, Article 6.

¹⁹ See generally, HRC General Comment 31, The nature of the general legal obligation imposed on States parties, CCPR/C/21/Rev.1/Add.13, 29 March 2004.

²⁰ E.g. *Trial of Pakistani Prisoners of War (Pakistan v. India)*; by decision of 15 December 1973, the case was removed from the list. The treaty law relating to international conflicts envisages the possibility of inter-State civil claims; e.g. Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 3; Protocol I of 1977, Article 91.

²¹ The enforcement provisions of the four Geneva Conventions are worded in the same way *mutatis mutandis*. By way of example, the enforcement provisions of the first Convention provide, “Art. 49. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

...

Art. 52. At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

...

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.” Protocol I of 1977 builds on the earlier provisions by providing additional “grave breaches”. In addition, it spells out the responsibility of commanders for the enforcement criminal matters and for co-operation in enforcement (Articles 88 and 89).

²² Kalshoven, F., *State Responsibility for Warlike Acts of the Armed Forces*, 40 ICLQ (1991) 827; see also the contributions of Kalshoven, David and Greenwood in H. Fujita, I. Suzuki, K. Nagano (eds), *War and Rights of Individuals*, Nippon Hyoron-sha Co, Ltd. Publishers, Tokyo, 1999. There are usually two different types of problem with such claims. First, if claiming against the offending State, the claim will have to be brought in its own courts. Before the courts of other States, the claim would hit the barrier of sovereign immunity; *Al-Adsani v. the United Kingdom*, 35763/97, ECHR, judgment of 21 November 2001; with regard to claims brought against individual State agents, as opposed to the State itself, see Foakes & Wilmschurst, *State Immunity: the United Nations Convention and its effect*, Chatham House, ILP BP 05/01, May 2005. In many States, rules of domestic law on jurisdiction prevent foreigners bringing claims arising out of the extra-territorial conduct of their armed forces. Second, it is common, at the end of an international conflict, for States to make arrangements for compensation. It is

possible that such arrangements will provide for claims to be brought by individuals; e.g under the United Nations Compensation Commission, which deals with claims arising out of the Iraqi invasion and occupation of Kuwait. Where that is not the case, if there were an independent possibility of individual claims, States would not, by their agreement, be able to determine once and for all their reciprocal commitments. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (E/CN.4/RES/2005/35), recently adopted by the Commission, need to be understood against this background. Certain States have reservations as to the applicability of the Basic Principles to violations of LOAC/IHL.

²³ There are other reasons why individuals bring claims, such as obtaining vindication of what they have claimed occurred, where the State is denying the applicant's version of events, or in an attempt to obtain the truth or to secure accountability.

²⁴ A trust fund is to be established for the benefit of victims of crimes under Article 79 of the Statute.

²⁵ E.g. Suter K.D., "An enquiry into the meaning of the phrase "Human Rights in Armed Conflicts", *Rev. de Droit Pénal Militaire et de Droit de la Guerre*, XV (3-4), 1976, p.393; Meyrowitz H., "Le Droit de la guerre et les droits de l'homme", *Rev. du Droit Public et de la Science Politique en France et à l'Etranger*, 5, 1972, p.1059.

²⁶ E.g. Meron T., *Human Rights in Internal Strife: Their International Protection*, CUP, 1987; *Human Rights and Humanitarian Norms as Customary Law*, OUP, 1989.

²⁷ See for example the use made of human rights in the case of *Tadic*, (IT-94-1) Interlocutory Appeal on Jurisdiction, Appeal Chamber, ICTY, 2 October 1995; on the usefulness of HRsL for the ICRC, see Pejic J., *The Law of Armed Conflict: Problems and Prospects*, Chatham House, 18-19 April 2005, summary of proceedings, pp.42-45.

²⁸ *Human Rights in Armed Conflicts*. Resolution XXIII adopted by the International Conference on Human Rights. Teheran, 12 May 1968.

²⁹ E.g. Resolution 1592 on the Situation concerning the Democratic Republic of Congo, S/RES/1592 (2005), adopted on 30 March 2005.

³⁰ ICJ, *Advisory Opinion*, July 8, 1996, para.25.

³¹ ICJ, *Advisory Opinion*, 9 July 2004.

³² *Ibid*, para.106.

³³ An article and a protocol to the Convention on the Rights of the Child expressly address an issue which arises in situations of conflict – the conscription or recruitment of child soldiers and their participation in conflict; Convention on the Rights of the Child, Article 38 and second optional protocol. The Convention against Torture addresses a phenomenon that is prohibited in all circumstances. LOAC/IHL prohibits the infliction of torture or cruel or inhuman or degrading

treatment or punishment in both international and non-international conflicts. In the case of CEDAW, CERD and the Convention on Migrant Workers, the treaty bodies may have to address the issue indirectly.

³⁴ CCPR/C/21/Rev.1/Add.11. To the best of the author's knowledge, no State has commented on the General Comment. This is in contrast to the situation after the HRC adopted General Comment 24 on reservations to human rights treaties. Three States, France, the UK and the USA, criticised certain paragraphs in that General Comment. Where a State does not object to a General Comment, especially where that particular State has in the past criticised a General Comment, that may be thought to imply, if not approval, at least non-objection. This is particularly important in the case of General Comments 29 and 31; see further below.

³⁵ "The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation."; *ibid*, para.3, emphasis added. The immediately preceding sentence makes it clear that "armed conflict" is being used to describe a situation in which LOAC is applicable; "During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers." Dennis, in the context of an article disputing the extra-territorial applicability of HRsL, cites evidence from the negotiating record with regard to ICCPR Article 4 which in fact supports the continued applicability of non-derogable HRsL in time of war. States were expressly trying to ensure that the article was consistent with the general international rules regarding the non-applicability of legal obligations in time of war, unless the obligation provided for continued applicability. The UK legal adviser suggested that the purpose of Article 4 was to prevent States from arbitrarily derogating from human rights obligations "in time of war". War, unlike armed conflict, is a technical term and can only exist between two States. The annotation prepared by the Secretary-General again suggested that the function of Article 4 was to make express provision for limited continued applicability "in time of war". This evidence does not address extra-territorial applicability but continued applicability in situations of conflict. Dennis M., "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", 99 *AJIL* (2005) p. 119 at pp.137-8.

³⁶ "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."; *ibid*, para.10.

³⁷ "As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations."; *ibid*, para.16.

³⁸ "In order to protect non-derogable rights, 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 a State party's decision to derogate from the Covenant."; *ibid*, para.16.

³⁹ Ibid, Footnote 9 in para. 16 states in part “See the Committee’s concluding observations on Israel (1998) (CCPR/C/79/Add.93), para. 21: “... The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention.” It should be noted that certain States, whilst not apparently objecting in principle to the possible applicability of the two legal regimes, have objected to particular manifestations of it. So, for example, the Netherlands objected to attempts by the HRC to raise events in Srebrenica; UN Doc. CCPR/CO/72/NET/Add.1, para. 19 (2003) cited in Dennis; note 35, p.125, footnote 47. This is a particularly interesting case because it is not clear that LOAC/IHL is applicable in peace support operations.

⁴⁰ ICJ, note 31, para.112 – the Court expressly endorsed the Committee’s view.

⁴¹ E.g. Report of the Special Rapporteur (Mr. Felix Ermacora) on the Situation of Human Rights in Afghanistan, A/49/650, November 8, 1994; Situation of Human Rights in Afghanistan, General Assembly Resolution A/RES/49/207, March 6, 1995. See also, Report of the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions, E/CN.4/2004/7, December 22, 2003, paras. 26-32; specific situations referred to include belligerent occupation (Israel and the Occupied Territories) and international armed conflict (military operations in Iraq in the spring of 2003, which at some point became a military occupation), as well as internal conflicts; Report of the Independent Expert on the situation of human rights in Afghanistan, Mr. Cherif Bassiouni, E/CN.4/2005/122, 11 March 2005; the Report of John Dugard, the Special Rapporteur on the Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, E/CN.4/2004/6, September 8, 2003, which refers to particular principles of both HRsL and IHL; Report of the Independent Expert on the question of the protection of human rights and fundamental freedoms while countering terrorism (Mr. Robert K. Goldman), E/CN.4/2005/103, 7 February 2005. The Special Rapporteurs on Extra-Judicial, Summary or Arbitrary Executions routinely include in the reports references to the law of armed conflicts, as well as to human rights law. The difficulties which arise in relation to this particular mandate from a failure to take into account LOAC/IHL are illustrated by a comment of a former Special Rapporteur; “Governments must not resort to aerial bombing, use of snipers or pre-emptive strikes. The international community should take note of this growing tendency to use excessive force;” E/CN.4/2004/7, December 22, 2003, para. 96.2.

⁴² Report of the Working Group on Arbitrary Detention, (E/CN.4/2003/8), December 16, 2002, paras. 61-64. Two separate issues have been of concern to the Working Group: detentions within the USA after 9/11 effected under powers under immigration law and detentions in Guantanamo Bay. The discussion here concerns only the latter category. The United States has provided information in the case of at least some persons detained within the United States; E/CN.4/2004/3/Add.1, p.20, opinion 21/2002. This suggests that it is deliberately drawing a distinction between the two categories of detainees.

⁴³ The United States has ratified the International Covenant on Civil and Political Rights. It has not entered a notice of derogation in relation to its activities since 9/11. On the implications of a failure to derogate, see further below.

⁴⁴ Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights, E/CN.4/2003/G/73, 7 April 2003.

⁴⁵ Opinion 5/2003, Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2004/3/Add.1, 26 November 2003, pp.33-35; the Opinion was adopted on 8 May 2003. The British position, in relation to those detained in Iraq, is significantly different from that of the US. The UK acknowledges the applicability of the UDHRs to all detainees. It expressly rejects the idea that PoWs and security detainees have protection under human rights treaty law, notably the ICCPR. It does not do this on the basis that the situation is one in which LOAC/IHL is applicable but rather on the basis that those particular detainees are recognised as being protected by Geneva Conventions III and IV and those protections are being afforded them. It did not appear to reject the applicability of the ICCPR to criminal detainees. This approach, unlike that of the US, is consistent with that taken by the ICJ. See generally Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6, 1st December 2004, especially at paras. 6-9. See also the UK's 4th periodic report to CAT, the list of issues, the statement, the response and the concluding observations. It is not clear whether the UK accepts the scrutiny of human rights mechanisms to ensure that the rights under the Geneva Conventions are being respected.

⁴⁶ Opinion 5/2003, Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2004/3/Add.1, 26 November 2003, pp.33-35, para.12. The US refused to provide information about the four cases, interestingly apparently citing reasons of national security rather than lack of jurisdiction; Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3, 15 December 2003, para.19.

⁴⁷ E.g. Vienna Convention on the Law of Treaties, Article 60.5, dealing with the consequences of a material breach.

⁴⁸ The US Operational Law Handbook 2004 (Berger, Grimes & Jensen, Eds.) contains a chapter dealing expressly with human rights law. It finds those rules of HRsL which represent customary international law to be applicable to US armed forces, including when acting extra-territorially. It states that, for reasons of domestic US law, because the treaties are not self-executing, treaty obligations are not applicable extra-territorially; see further below. In its second periodic report to CAT, 6 May 2005, the US explains the steps it has taken to give effect to its obligations, including in relation to detainees in Iraq, at least some of whom were clearly protected under LOAC/IHL. There is no suggestion that CAT has no jurisdiction on account of the applicability of LOAC/IHL; <http://www.state.gov/g/drl/rls/45738.htm#additional>.

⁴⁹ The African Commission on Human and Peoples' Rights has addressed situations of conflict. The African Charter does not contain a derogation clause but the Commission takes the situation in a State into account when dealing with individual applications or country missions.

⁵⁰ OAS.Treaty Series No. 36, 1144 UNTS123, entered into force July 18, 1978.

- ⁵¹ 119 UNTS 3, entered into force December 13, 1951; amended by Protocol of Buenos Aires, 721 UNTS 324.
- ⁵² Habeas corpus in emergency situations, Advisory Opinion OC-8/87 of January 30, 1987 and judicial guarantees in states of emergency, Advisory Opinion OC-9/87 of October 6, 1987.
- ⁵³ *Abella v. Argentina*, Case 11.137, Report N° 55/97, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997).
- ⁵⁴ *Las Palmeras v. Colombia*, Preliminary Objections, Judgment of February 4, 2000.
- ⁵⁵ Judgment of November 25, 2000, Inter-Am Ct. H.R. (Ser. C) No. 70 (2000).
- ⁵⁶ *Ibid*, para. 209.
- ⁵⁷ They include the four inter-State cases brought by Cyprus against Turkey, the individual applications brought against Turkey arising out of its occupation of northern Cyprus and arguably Part III, section II of the fourth Geneva Convention was applicable to the facts in *Issa and others v. Turkey*, 31821/96, admissibility decision of May 30, 2000; decision of second Chamber, 16 November 2004; see also *Bankovic and others v. Belgium and 16 other members of NATO*, 52207/99, Admissibility Decision of 12 December 2001.
- ⁵⁸ *Isayeva, Yusupova and Bazayeva v. Russia*, 57947/00, 57948/00 and 57949/00, judgment of 24 February 2005 and two other cases involving three applicants in which judgment was given on the same day. The cases concern incidents which arose during military operations in Chechnya. The Russian Constitutional Court has determined that the situation falls within Protocol II to the Geneva Conventions; Judgment of the Constitutional Court of the Russian Federation of 31 July 1995 on the constitutionality of the Presidential Decrees and the Resolutions of the Federal Government concerning the situation in Chechnya, European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1.
- ⁵⁹ E.g. at certain times the situation in Northern Ireland and south-east Turkey; the governments in question denied that the situation constituted an “armed conflict”.
- ⁶⁰ E.g. *Brogan & others v. UK*, ECHR, 11209/84, 11234/84, 11266/84, judgment of November 29, 1988 and *Aksoy v. Turkey*, ECHR, 21987/93, judgment of December 18, 1996, on periods of detention when investigating terrorist crimes; *Kaya v. Turkey*, ECHR, 22729/93, judgment of February 19, 1998, on carrying out autopsies in situations of conflict.
- ⁶¹ The fact that this occurs in some cases but not others raising a very similar issue suggests that whether LOAC/IHL is used may depend on the individual judge or member of the secretariat responsible for the case e.g. contrast *Ergi*, ECHR, 23818/94, judgment of July 28, 1998 where the legal issue was handled consistently with LOAC/IHL and *Ozkan & others*, ECHR, 21689/93, judgment of April 6, 2004, where no attention at all appears to have been paid to LOAC/IHL;

see paras. 103-6 & 305-6. In the Chechen cases, note 58, the ECHR appears to have used a law enforcement test, rather than a LOAC/IHL test in para. 171 but it did take into account the need for precautions in attack. It is not clear whether in non-international conflicts a party can target the fighters of the other side without the need for them to be posing a threat. In international conflicts, combatants can be targeted at any time. It is not clear whether that is also the case for civilians taking a direct part in hostilities in a non-international conflict, particularly since they can only be targeted for such time as they are participating.

⁶² In the first two cases brought by Cyprus against Turkey, the Commission determined that, as Turkey had not derogated, the only grounds for detention were those set out in Article 5 of the Convention. This meant that the detention of PoWs was unlawful; 6780/74 & 6950/75, Report of the Commission, adopted on 10 July 1976; two members of the Commission suggested that LOAC/IHL became applicable by virtue of the facts and should have been taken into account with or without derogation.

⁶³ See history, note 16 above.

⁶⁴ Note 34 and accompanying text.

⁶⁵ In the case of the initial American operations in Afghanistan in October 2001, there is no doubt that there was an international armed conflict between the USA and its allies and the Afghan authorities (the Taliban), assisted by Al Qaida. Common Article 2 of the Geneva Conventions 1949 makes it clear that it is not necessary for a State to recognise its opponent as the legitimate authority; it is sufficient for it to be the de facto authority in control of the State. There was presumably, at the same time, a non-international conflict between the Taliban and the Northern Alliance, unless the latter were fighting as part of the American armed forces. At some point, the American forces were present with the consent of the newly installed authorities. From then on, it would appear that there has been a non-international conflict between the US armed forces and the remnants of the Taliban and Al Qaida; Pejic J., "Terrorist Acts and Groups: A Role for International Law?", LXXV BYIL (2004), forthcoming, p.1. At the time of the drafting of common Article 3, it would appear that the negotiating parties assumed that the conflict occurred between a non-State party and the State whose territory it was; Pictet J. (Ed.) Commentary to the Geneva Conventions of 1949, 4 volumes, 1952, 1960, 1960 and 1958, ICRC; commentary to common Article 3. There is nothing on the face of the provision, however, that precludes its applicability between a non-State group and a State operating with the consent of the territorial State. At what point did the conflict shift from being international to being non-international; was it with the installation of President Karzai, with his endorsement by the Loya Jirga or only after elections? Similar difficulties arise in relation to Iraq. It started out as an international armed conflict and then a belligerent occupation. At what point did the coalition forces cease to be occupying forces or do they in fact remain occupying forces, if the notion of the consent to their presence of sovereign Iraqi authorities is something of an illusion? If an intense military operation occurs during a military occupation, as was the case at Falluja, is that subject to the law and order powers of the occupying power or to the provisions on the conduct of hostilities in Protocol I or customary law? The ICJ addressed the question in an ambiguous

way in the Advisory Opinion on the Wall, note 31 at para. 124. It is not clear whether the Court was saying that, at the relevant time, the provisions on the conduct of hostilities were not applicable on the facts or whether it was suggesting that, as a matter of law, once territory is occupied the rules on the conduct of international operations are no longer applicable, presumably meaning that they must take place in accordance with the law and order authority of the occupying power. Further problems arise in the case of isolated individual attacks, such as the attack in Yemen by the American predator drone; Pejic, art. cit., pp. 17-18. It may have been an armed attack but did it constitute an armed conflict?

⁶⁶ LOAC/IHL treaties are not drafted in the same way as HRsL and cannot be interpreted in the same way. The *Abella* case, note 53, shows that a human rights body is perfectly capable of applying LOAC/IHL properly, when it has the requisite expertise.

⁶⁷ US Operational Law Handbook (2004), note 48, pp. 48-49; Dennis M., note 35.

⁶⁸ In addition to general comments 15 and 31 and the case-law before human rights bodies, there is a human rights treaty designed to protect foreigners, the International Convention on the Protection of the Rights of all Migrant Workers.

⁶⁹ Under the law of state responsibility, States are responsible to other States for the treatment of nationals of the other. This is not based on the individual rights of the victim but rather treats the individual as a species of state property.

⁷⁰ *Bankovic*, note 57; Dennis, note 35.

⁷¹ *Cyprus v. Turkey*, note 62.

⁷² In the second US periodic report to CAT, note 48, the US sets out the measures it has taken to protect detainees in Afghanistan and Iraq. The UK accepted the applicability of HRsL to common criminals in Iraq in its dialogue with the Working Group on Arbitrary Detention, note 45. The 17 respondent Governments in the case of *Bankovic*, note 57, stated that the Convention was applicable to persons detained outside national territory; para. 37.

⁷³ The case-law will be examined in the context of that particular question. The totality of the case-law represents the evidence that applicability of HRsL extra-territorially cannot be rejected in principle. It should also be noted that the ICJ Advisory Opinion, note 31, concerned the applicability of HRsL outside national territory, in territory occupied by Israel. The issue of the circumstances in which a person outside national territory is nevertheless within the jurisdiction for the purposes of HRsL specifically in the context of military operations is the subject-matter of litigation in various States, including Italy and the Netherlands. In the case of the UK, such an issue has arisen in relation to deaths at the hands of British armed forces in Iraq during the period of military occupation; *Al-Skeini et al. v. Sec. of State for Defence*, [2004] EWHC 2911; both sides are appealing the decision of the High Court.

⁷⁴ Under Article 2 of the ICCPR, a State undertakes to respect and ensure the rights of “all individuals within its territory and subject to its jurisdiction”. The HRC has in recent times interpreted “and” disjunctively; general comment 31, note 19. Article 2 of CAT provides that States will take measures to prevent “acts of torture in any territory under its jurisdiction”; it is unusual in that the focus is not on the individual victim. Article 22 of CAT provides for petitions from “individuals subject to its jurisdiction”. There is no analogous provision in the CESCR, but the Committee has interpreted the Covenant as applying to an occupying power in occupied territory, a view which has been endorsed by the ICJ. Under Article 1 of the American Convention, States undertake to respect the rights of “all persons subject to their jurisdiction”. There is no general jurisdictional clause in the African Charter on Human and Peoples’ Rights. The Protocol establishing the African Court defines the jurisdiction of the Court but not that of the High Contracting Parties. Under Article 1 of the ECHR, States undertake to “secure to everyone within their jurisdiction” the rights under the Convention.

⁷⁵ Note 19, para.10.

⁷⁶ This is subject to a significant qualification. Under LOAC/IHL, an occupying power is not allowed to change the law in place in the territory, except where it is necessary to do so for its own security; Hague Convention IV (1907), annex Article 43; Geneva Convention IV, Article 64. In a situation of military occupation, by definition the territory “is actually placed under the authority of the hostile army” and “[t]he occupation extends only to the territory where such authority has been established and can be exercised”; Hague Convention IV (1907), Annex, Article 42; emphasis added.

⁷⁷ HRC Concluding Observations on Periodic Reports of Israel, UN Doc.CCPR/C/79/Add.93, para.10; CCPR/CO/78/ISR, para. 11; of Syria, CCPR/CO/71/SYR, para. 10 and of Morocco CCPR/C/79/Add.113, para.9 and CCPR/CO/82/MAR, 1 December 2004, paras. 8 & 18; ECHR: the inter-State litigation between Cyprus and Turkey culminating in 25781/94, judgment of 10 May 2001 and the individual applications against Turkey arising out of the situation in northern Cyprus such as the case of *Loizidou*, ECHR, 15318/89, judgment of 18 December 1996.

⁷⁸ Contrast concluding observations on the third and fourth periodic reports of Israel, note 77. In the third report, the HRC pointed to “... the long-standing presence of Israel in these territories, Israel’s ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein”; para.10, emphasis added. In the fourth report, the HRC stated “... the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law”; para.11, emphasis added.

⁷⁹ *Ilascu & others v. Moldova & the Russian Federation*, with Romania intervening, ECHR, 48787/99, Judgment of 8 July 2004; the view of the Court may have been affected by the fact that Russian forces were responsible for the original act of detention.

⁸⁰ ECHR, 31821/96, admissibility decision of May 30, 2000; decision of second Chamber, 16 November 2004.

⁸¹ *Behrami v. France*, 71412/01, ECtHR, 16 September 2003; the case has been communicated to the French government. One child was killed and another injured when a cluster weapon exploded in the French area of operations in Kosovo; see generally HRC, General Comment 31, note 19.

⁸² HRC 29 July 1981, UN Doc.A/36/40, 176; Communication No.52/1979, CCPR/C/13/D/52/197.

⁸³ IACHR Report No. 109/99, Case No. 10,951, 29 September 1999, Ann. Rep. IACHR 1999.

⁸⁴ Center for Constitutional Rights; http://www.ccr-ny.org/v2/legal/september_11th/docs/3-13-02%20IACHRAAdoptionofPrecautionaryMeasures.pdf.

⁸⁵ ECHR, 46221/99, judgment of 12 March 2003; Grand Chamber judgment of May 12, 2005, para.91. This decision postdates that in *Bankovic*, note 57.

⁸⁶ *Lopez Burgos*, note 82, para 12.2, emphasis added. This is further confirmed in the separate opinion of Mr. Tomuschat.

⁸⁷ Note 57.

⁸⁸ E.g. In the *Ilascu* case, note 79, different violations were found against Moldova and Russia; contra *Bankovic*, note 57.

⁸⁹ *Disabled Peoples' International et al v. United States*, Case 9213, Inter-Am. C.H.R. 184, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987) (Annual Report 1986-1987).

⁹⁰ *Salas and others v. the United States*, IACHR Report No.31/93, Case No. 10,573, 14 October 1993, Ann. Rep. IACHR 1993, 312.

⁹¹ *X v Federal Republic of Germany* (Application No 1611/62; 25 September 1965), 8 Ybk ECHR, p.158 at 169; *WM v Denmark*, 17392/90, admissibility decision of 14 October 1992.

⁹² *Varnava & others v. Turkey*, 16064/90 & others, admissibility decision of April 14, 1998.

⁹³ Note 82.

⁹⁴ Such a test has the additional advantage of being consistent with the law of State responsibility. It also ensures that applicants complaining of the same acts under the same control of the same State agents are treated in the same way, whether the harm occurs within or outside national territory. E.g. *Isiyok v. Turkey*, 22309/93, admissibility decision of 3 April 1995; friendly settlement of 31 October 1997; the alleged violation was the harm that resulted from aerial bombardment. It would seem somewhat strange if whether or not a victim is within the jurisdiction of a State depends on which side of the border the missile falls. It would also ensure

that victims of aerial attack would be subject to the same jurisdictional criterion as victims of ground attack. If the test used is control of the victim, as opposed to control over the infliction of the alleged violation, ground forces may be found to be in control of the applicant, as in the *Issa* case, note 57, but it is difficult to see how airborne forces could be, even when that person is intentionally targeted. The difficulty with the admissibility decision of the ECHR in the case of *Bankovic*, note 57, is that it appears to make jurisdiction dependent on the colour of the uniform or on the type of weapon used.

⁹⁵ E.g. the common practice, prohibited under LOAC/IHL, of removing the ears of dead opponents as some form of trophy; e.g. *Akkum, Akan and Karakoc v. Turkey*, ECHR, 21894/93, judgment of March 24, 2005.
