13. International humanitarian law and human rights law

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1. INTRODUCTION

The nature of the relationship between international humanitarian law and international human rights law remains a vexed one. In recent years, human rights lawyers and activists have sought to apply human rights norms to military conduct in international and internal conflicts, and during belligerent occupations. With varying degrees of success, complainants have brought their cases before international tribunals, such as the European Court of Human Rights and the Inter-American Commission and Court of Human Rights, and to national courts able to apply international human rights standards. Although there exist situations falling within a ‘grey zone’\(^1\) between peace and war where it can be unclear what law applies, this development has occurred largely because forums exist to hear human rights claims, whereas they do not for persons claiming individual redress for violations of international humanitarian law.\(^2\) However, human rights norms have also been seen as more restrictive: as placing greater constraints on states’ freedom to conduct hostilities, preventively detain, and administer occupied territories. It is for this reason that some states have resisted attempts to extend the reach of international human rights law into areas traditionally seen as governed by international humanitarian law.

This chapter will examine the relationship between those two bodies of law. It will seek to reprise the extensive debates on the subject and, in the light of recent developments, to present some conclusions. It will be argued that principles have now developed to govern the relationship between the two bodies of law. However, their application to different situations remains a work-in-progress and controversies are likely to persist.

2. INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TWO DIFFERENT HISTORIES

The laws of war, the traditional name for what is now known as international humanitarian law, have a good claim to be one of the oldest areas of international law. Throughout history states have sought to regulate their mutual conflicts. Thus, the laws

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of war governed issues which have always fallen within the scope of international law, as traditionally defined as the law regulating inter-state relations. The laws of war sought to harmonize the dictates of humanity with military necessity, and founded themselves on reciprocity backed up by reprisals in case of breach. What this meant, however, is that international humanitarian law simply regulated states’ rights vis-à-vis each other as belligerents.

This was clearly set out in the 1949 Geneva Conventions (hereinafter ‘GCs’). With the exception of Common Article 3 (at the time a novelty), the GCs only apply in situations of ‘declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties’ and to ‘cases of partial or total occupation of the territory of a High Contracting Party’. In addition, the majority of their provisions apply only to ‘protected persons’. The requirement for being a protected person was that one was not a national of the state the hands of which one finds oneself.³ Pictet’s Commentary put the matter clearly:

The definition [of protected persons in Article 4(1) of GC IV] has been put in a negative form; as it is intended to cover anyone who is not a national of the Party to the conflict or occupying Power in whose hands he is. The Convention thus remains faithful to a recognised principle of international law: it does not interfere in a State’s relations with its own nationals.⁵

International human rights law, conversely, marked a departure in that it sought to regulate areas which traditionally fell outside the scope of international law as being within states’ domestic jurisdiction. Previously, the rights states enjoyed over persons and property within their national territories were governed solely by national law, provided that they did not trespass on the rights of other states.⁶ This principle also had consequences as regards international humanitarian law. As the laws of war traditionally only applied in situations of international armed conflict and governed only states’ treatment of other states’ nationals, states retained a free hand in how they suppressed rebellion and other unrest among their subjects. Save when states recognized rebels as belligerents,⁷ international law left internal armed conflicts to be governed by states’ national law.⁸

⁴ Article 4(1) provides that: ‘Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.’
⁶ For example, by acting unlawfully towards the property or persons of other states’ nationals: see Mavrommatis Palestine Concessions (Greece v. United Kingdom), Judgment of 30 August 1924, PCIJ Series A, No. 2, 12.
⁸ Indeed, this view persisted well into the Post-World War II period. France, throughout the Algerian war of independence, consistently argued that the conflict was an internal matter governed by French criminal law, and carefully avoided making any statement which might be
From its beginnings, international human rights law was different. It sought to refigure the relationship between states and their own nationals. International law was used to limit states’ sovereign rights, which had previously only been subject to limitation through the operation of national law. This is why the precursors of international human rights treaties are to be found at the national level, in national constitutions and bills of rights, providing protections for citizens against their governments; in contrast to international humanitarian law which has, from the beginning, existed as a body of rules within international law. As Bill Bowring has written, albeit with some hyperbole, whereas international humanitarian law, under various names, has existed throughout history and is ‘intrinsically conservative, taking armed conflict as a given’, international human rights law has its origins in the democratic revolutions of the late eighteenth century and ‘has always been revolutionary, scandalous in its inception, inspired by collective action and struggle, and threatening to the existing state order’.9

This may not entirely be the case, international humanitarian law and international human rights law were not established on the same premise and, at least originally, were not considered to have much overlap. It will be recalled that the category of crimes against humanity was included in the Charter of the International Military Tribunal to cover atrocities which could not be categorized as war crimes, as they had been committed against German nationals.10 By contrast, the 1948 Genocide Convention, which has a good claim to be the first human rights treaty,11 concerned itself largely with how states treat their own nationals,12 and went beyond the International Military Tribunal Charter in making it clear that genocide could be committed ‘in time of peace or in time of war’.13 Contracting states’ obligations under the European Convention on Human Rights to ‘secure to everyone … the rights and freedoms defined in Section I of [the] Convention’ were originally provided to only be with respect to ‘all persons residing within their territories’, and although the latter phrase was changed during the treaty negotiations to ‘all within their jurisdiction’, it was simply with a view to ‘expanding the Convention’s application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting
States’. Similarly, each state party to the International Convention on Civil and Political Rights ‘undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant’, a provision which would appear to be meant to be read conjunctively rather than disjunctively. Both provisions have been subject to expansive interpretations as a result of subsequent practice. Nevertheless, it remains the case that the extraterritorial application of human rights treaties is the exception. Just as with national constitutions and bills of rights, the norm is their application within states’ national territories.

In the same period as international human rights law was being developed, however, the reach of international humanitarian law was being extended. Common Article 3 of the 1949 Geneva Conventions, which provided some protection in situations of armed conflict ‘not of an international character occurring in the territory’ of a High Contracting Party, was augmented by the 1977 Additional Protocol II. However, the definition of armed conflict in Additional Protocol II was narrow, and it was initially unclear whether breaches of the international humanitarian law applicable in non-international armed conflict incurred individual criminal responsibility. Even today, the rules governing non-international armed conflict, despite the valiant efforts of the International Committee of the Red Cross (hereinafter ‘ICRC’), can seem sparse in comparison with the rich and detailed provisions governing international armed conflicts. And, in contrast with international armed conflicts, there exists no ‘combatant privilege’ in internal armed conflicts, at least as regards insurgents, who can continue to be prosecuted and punished for their activities under national law. States (that is, governments) have retained their sovereign right to suppress rebellion, while gaining belligerent rights under international law when insurgencies reach a certain threshold of intensity, giving them the choice to treat insurgents as criminals, or as parties to an armed conflict, or both, as best suits their purposes.

Given this situation, and given that human rights law, as we have seen, prima facie governs a state’s conduct within its national territory, the issue of its applicability in

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16 See infra section 4.


18 Requiring that rebels exercise control over territory: Article 1(1), Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts (1977).

19 Not until 1995 was it confirmed that such conduct could amount to a war crime: see Prosecutor v. Dusko Tadić, Case No. IT-94-1-A, ICTY Appeals Chamber, Interlocutory decision on jurisdiction, 2 October 1995, paras 128–137.

non-international armed conflict immediately comes into issue. And although it has been argued that international humanitarian law, as *lex specialis*, displaces human rights law, such an opinion is contrary to the weight of opinion. The argument was put to the International Court of Justice during proceedings concerning the *Legality of the Threat or Use of Nuclear Weapons*. In response, the Court stated that:

> the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.

Such has also been the consistent view of all human rights bodies. Unfortunately for the advocates of an absolute distinction between the two regimes, states sold the pass long ago. Beginning with the 1968 Tehran Conference on Human Rights and the subsequent General Assembly resolutions on the protection of human rights in armed conflict, the United Nations has accepted that human rights law applies in situations of armed conflict. This view is regularly reiterated in resolutions of the Security Council, the General Assembly, the former Commission on Human Rights and the present Human Rights Council. It is also reflected in international humanitarian law itself. Article 72 of Additional Protocol I makes specific reference to ‘other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict’, while the preamble to Additional Protocol II recalls that ‘international instruments relating to human rights offer a basic protection to the human person’. And the existence of derogation clauses in human rights treaties indicates that they too, explicitly or implicitly, admit their general application.

The conclusion must be that human rights law applies in situations of armed conflict, whether international or non-international, (i) insofar as there has not been a valid

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22 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, at 239: ‘It was suggested that the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.’


26 GA Res. 2444 (XXIII): Respect for human rights in armed conflicts (19 December 1968), and GA Res. 2675 (XXV): Basic principles for the protection of civilian populations in armed conflicts (9 December 1970).

derogation; and (ii) to the extent that such situations fall within the relevant treaty’s geographical scope.\textsuperscript{28} In consequence, we will first consider the extent to which states can derogate from their human rights obligations and the extraterritorial scope of those obligations, before going on to consider the various situations which arise when international human rights law and international humanitarian law are concurrently applicable.

Before doing so, however, it should be recalled that the general view is that human rights law addresses only states.\textsuperscript{29} The activities of non-state parties to conflicts are governed only by international humanitarian law. This has occasionally been advanced as a reason why human rights law should not govern the conduct of government forces during internal armed conflicts, on the basis that otherwise what is said to be ‘one of the fundamental precepts of the law of armed conflict … the legal equality of belligerent parties’ would be undermined.\textsuperscript{30} Legal equality in this context, however, simply means equality before the law; both parties are governed by the law applicable to the conflict (the \textit{jus in bello}) regardless of the justice of their cause (in particular, whether they are in breach of the \textit{jus ad bellum}).\textsuperscript{31} Thus, in the context of an internal armed conflict, the principle prevents a government from disapplying rules of international humanitarian law on the grounds that the insurgents fighting against it have unlawfully taken up arms.\textsuperscript{32} It does not prevent states from binding themselves to apply higher standards, albeit that non-state parties to such armed conflicts remain bound solely by international humanitarian law.\textsuperscript{33} It should equally be recalled, however, that rebels can be punished not only for breaches of international humanitarian law but also for violations of national law, that is, for treason for taking up arms, and for murder for killing government soldiers.

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\textsuperscript{28} In addition, the fact of the existence of an armed conflict may be relevant as regards the application of human rights law. The existence of an ongoing armed conflict can affect the extent to which qualified rights can be restricted, both civil and political rights (freedom of speech, freedom of conscience and religion, freedom of association and assembly), and also economic, social and cultural rights, which are governed, in many cases, by the principle of ‘progressive realization’ subject to ‘available resources’: see Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, and Committee on Economic, Social and Cultural Rights, General Comment 3: the nature of State Parties’ obligations (Article 2, para. 1 of the Covenant), UN Doc. E/1991/23, 14 December 1990.


\textsuperscript{30} J.K. Kleffner, ‘Section IX of the ICRC Interpretative Guidance on Direct Participation in Hostilities: The End of \textit{Jus in Bello} Proportionality as We Know It?’, (2012) 45 \textit{Israel LR} 35, at 49.


\textsuperscript{32} See F. Bugnion, ‘\textit{Jus ad Bellum, Jus in Bello} and Non-International Armed Conflicts’, (2003) 6 \textit{YIHL} 167.

\textsuperscript{33} Although the mechanisms by which this occurs remain unclear: see S. Sivakumaran, ‘Binding Armed Opposition Groups’, (2006) 55 \textit{ICLQ} 369.
3. DEROGATIONS FROM STATES’ HUMAN RIGHTS OBLIGATIONS

Article 15(1) of the European Convention on Human Rights states that:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Similar provisions appear in the International Covenant on Civil and Political Rights and the American Conventions on Human Rights, but not in the African Charter on Human and Peoples’ Rights or other human rights treaties. Unlike the European or the American Conventions, the International Covenant does not specifically indicate war as a time of public emergency. However, situations of armed conflicts fit squarely within the category of public emergencies threatening the life of the nation, and have consistently been held to do so by human rights bodies, as well as by the International Court of Justice.

States do not benefit from a derogation from their relevant treaty obligations automatically upon the existence of a public emergency threatening the life of the nation. Derogations must be notified to be effective. Indeed, the International Covenant requires that a state party not only notifies the derogation itself to the UN Secretary-General but also proclaims a state of emergency under its national law, while the American Convention requires notification of the date set for its termination. It is unlawful for a state to derogate from its human rights obligations except in conformity with the procedural requirements imposed by the relevant treaty or treaties.

The term ‘public emergency threatening the life of the nation’ extends far more widely, however, than just situations of armed conflict. In the first case when the legality of a derogation under Article 15 of the Convention was at issue, the European Court of Human Rights was willing to defer to the judgment of the Irish Government that a campaign by a terrorist group which, in a period of over six months, had resulted in the deaths of two policemen and the wounding of another, amounted to such a situation. Subsequent cases have confirmed this practice of deference of the judgment of the political branch of Government, which is said to be best fitted to making what is

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35 As expressly indicated by the wording of Article 15(1) of the European Convention on Human Rights (1950).
39 More than one derogation may be necessary depending on the human rights treaties to which a state is party.
40 Lawless v Ireland, Judgment of 1 July 1961, Series A no. 3.
seen as a political rather than a legal determination. As Lord Hope stated in the UK House of Lords in the *Belmarsh detainees* case:

> the questions whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and for Parliament. The judgment that has to be formed on these issues lies outside the expertise of the courts …

Voices have been raised against such a wide interpretation of the term, most eloquently that of Lord Hoffmann, also in the *Belmarsh detainees* case. Such views, however, have not been followed at the national, let alone the international level. What this means is that situations of unrest and civil strife in response to which states can derogate from their human rights obligations exist below the threshold for the application of international humanitarian law.

This is not to say, however, that in such circumstances neither international humanitarian law nor human rights law governs. Article 15(2) of the European Convention on Human Rights provides that: ‘No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. Article 4(2) of the International Covenant on Civil and Political Rights states that: ‘No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.’ The two lists are in substance the same: preventing derogation from the right to life; the prohibitions of torture and inhuman or degrading treatment and punishment, and of slavery and servitude; and the principle of non-retroactivity. The International Covenant includes the right to freedom of thought, conscience and religion in its list of non-derogable rights, which the European Convention does not. It might be thought, however, that this is a distinction without a difference. Freedom of thought and religion is a qualified right, so it can be restricted according to the applicable circumstances, so the right can be subject to restrictions in emergency situations without derogation. Conversely and more generally, derogations to rights can only be to ‘the extent strictly required by the exigencies of the situation’, which limits the extent to which any derogable right can be restricted following derogation. This idea has been systematized by the Human Rights Committee, which has argued that a number of derogable rights have a non-derogable

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41 *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56, at para. 116. See also Lord Bingham’s conclusion, at para. 29, that: ‘great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment’.

42 ‘When one speaks of a threat to the “life” of the nation, the word life is being used in a metaphorical sense. The life of the nation is not coterminous with the lives of its people … I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation … Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.’ *Ibid.*, paras 91 and 96.

43 The International Covenant also prohibits derogation from the right not to be imprisoned for failure to fulfil a contractual obligation, which does not appear in the European Convention, but this may simply be because the existence or not of an armed conflict is irrelevant to the enjoyment of the right.
However, a derogation that complies with a state’s obligations under international humanitarian law is unlikely to be considered to go beyond what a situation of armed conflict requires.

States’ practice as regards derogations is inconsistent. Some states have made derogations when faced with situations of armed conflict. Others have not. What is common, however, is for states facing insurgencies to avoid describing them as armed conflicts, usually because they fear that such a categorization, by defining rebels as parties to an armed conflict (although it grants them no additional legal rights) dignifies their struggle and detracts from their status as criminals. In such situations, human rights law continues to apply, as it were, by default, subject only to any lawful derogations. Nevertheless, there remains an overlap — whether or not a state takes advantage of its right of derogation or not — between the fields of application of human rights and humanitarian law, at least that applicable in non-international armed conflicts. This is unsurprising. As we have already seen, a number of human rights treaties predate the substantive application of international humanitarian law to non-international armed conflicts. At the time of the adoption of the European Convention on Human Rights and the International Covenant on Civil and Political Rights, only Common Article 3 governed ‘conflicts not of an international character’. Save for imposing certain minimum guarantees, international humanitarian law refrained from regulating non-international armed conflict, seeing it as a matter within states’ domestic jurisdiction governed by national, rather than international, law. Human rights law then began to regulate how states exercised their sovereign rights, including during civil wars, insurgencies and other situations of internal unrest. To this extent, then, it cannot be said that human rights law has trespassed on the domain

46 As Françoise Hampson points out, the Northern Irish ‘Troubles’ may, at certain times, in certain places, have crossed the threshold for the application of Common Article 3: ibid., at 555.
47 Unless recognized as belligerents: op cit. n.7. Such recognition is, however, uncommon and it may be that the concept of belligerency is falling into desuetude: Patrick Daillier et al., Droit International Public, 8th edn (Paris: LGDJ, 2009), at para. 371.
48 Hence Article 56 (‘the colonial clause’) of the European Convention on Human Rights, ensuring that state parties could avoid the application of the Convention to their colonial possessions: see L. Moor and A.W.B. Simpson, ‘Ghosts of Colonialism in the European Convention on Human Rights’, (2005) 76 BYIL 121. At the time of the Convention’s adoption, a number of states of the Council of Europe retained colonial empires, where they faced increasing resistance to their rule. Indeed, the two earliest inter-state cases before the European Commission on Human Rights concerned the UK’s conduct in repressing the EOKA insurgency in Cyprus: see A.W.B. Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention (Oxford: Oxford University Press, 2001), at 924–1053.
of international humanitarian law; one might even argue the reverse. The same cannot
be said, however, as regards the extraterritorial application of human rights law.

4. THE EXTRATERRITORIAL SCOPE OF STATES’ HUMAN RIGHTS OBLIGATIONS

Article 1 of the European Convention on Human Rights obliges Contracting Parties to
'secure to everyone within their jurisdiction the rights and freedoms defined in Section
I of this Convention'. The International Covenant on Civil and Political Rights is, on
the face of it, even more restrictive. Some other human rights treaties have similar
provisions. Others have nothing on the subject at all. However, although states’
jurisdiction is primarily territorial, it can extend further, so that the extraterritorial
application of human rights treaties, even to non-nationals, cannot be ruled out. Indeed,
the term 'jurisdiction' is Janus-faced, being used to refer both to the extent to which
states lawfully can legislate, adjudicate and enforce their national laws and regulations
as a matter of international law, and to the extent to which they in fact do so. As will
be seen, human rights bodies have consistently looked at the facts in order to determine
whether jurisdiction has been exercised, as has the International Court of Justice.

The extraterritorial extent of states’ human rights obligations has arisen in two
contexts in particular: when a state is in belligerent occupation of foreign territory and
when it undertakes military operations abroad. Whether a state is in occupation is a
question of fact; a territory is occupied when it is ‘actually placed under the authority
of the hostile army’.

The question is whether in fact the armed forces that have invaded the adversary’s territory
have brought the area under their control through their physical presence, to the extent they

49 Although account does need to be taken of the fact that the date of coming into force of
human rights treaties has often been some years after their adoption; and individual states’
adherence has sometimes been much later. For example, France, although an original signatory
to the European Convention on Human Rights, did not become a party until 1974, nearly 21
years after the treaty’s entry into force.

50 See supra n.15. The jurisprudence of the Human Rights Committee, however, has
consistently taken the view that the International Covenant has an extraterritorial application.

51 Article 1(1) of the American Convention on Human Rights provides that: 'The States
Parties to this Convention undertake to respect the rights and freedoms recognized herein and to
ensure to all persons subject to their jurisdiction the free and full exercise of those rights and
freedoms.' Article 2 of the Convention against Torture requires that: 'Each State Party shall take
effective ... measures to prevent acts of torture in any territory under its jurisdiction.' Article 2(1)
of the Convention on the Rights of the Child states that: 'States Parties shall respect and ensure
the rights set forth in the present Convention to each child within their jurisdiction ...'.

52 In particular, the International Covenant on Economic, Social and Cultural Rights; the
International Convention on the Elimination of All Forms of Racial Discrimination; and the
Convention on the Elimination of All Forms of Discrimination against Women.

53 Article 42, Hague Regulations annexed to the 1907 Hague Convention (No. IV)
respecting the Laws and Customs of War on Land.
can actually assume the responsibilities which attach to an occupying power. This includes the ability to issue directives to the inhabitants of the conquered territory and to enforce them.\textsuperscript{54}

In brief, the occupier must have expelled the indigenous sovereign and established itself in its place. Moreover, an occupier not only is subject to obligations as such, but also enjoys rights, which arise by virtue of the effectiveness rather than the legality (or otherwise) of its occupation. Therefore, it might be thought, a state which claims to be in occupation of a particular territory (and, consequently, to benefit from the rights accorded to occupiers), should also have to bear the burdens, even if it does not satisfy the legal (that is, factual) criteria for being an occupier.

Although formally belligerent rights, granted by international law, the rights enjoyed by an occupier are, in their substance, sovereign rights; and the condition of their enjoyment is precisely that a state is able to act as a sovereign (at least to the exclusion of any other) in territory it has occupied. For these reasons, for the purpose of the applicability of human rights protections, human rights bodies have assimilated territory occupied by a state to its national territory. Human rights treaty monitoring bodies have consistently done so in their concluding observations to states parties’ reports.\textsuperscript{55} The same view has been taken by international courts. In \textit{Loizidou v. Turkey}, the European Court of Human Rights explained that:

\begin{quote}
Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside of its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control …\textsuperscript{56}
\end{quote}

In its Advisory Opinion on the \textit{Legality of the Construction of a Wall in the Occupied Palestinian Territory},\textsuperscript{57} the International Court of Justice had to decide whether the human rights treaties to which Israel was a party (the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child) were applicable, in addition to international humanitarian law, to Israel’s conduct as occupier of the Occupied Palestinian Territory. In answering the question, the Court simply adopted the views expressed by the treaties’ monitoring bodies (the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child), all of which had previously expressed the opinion that those treaties did apply to Israel’s activities in the Territory.

This view, it must be admitted, has not always been shared by states. In the \textit{Legality of the Wall} case it was adopted contrary to Israel’s contentions. Famously, the USA did not accept the opinion of the Inter-American Commission on Human Rights that the

\begin{footnotes}
\textsuperscript{55} See the examples cited in Drogea, \textit{supra} n.24, at 510–511 and 518; and Hampson, \textit{supra} n.45, at 567–569.
\textsuperscript{56} \textit{Loizidou v. Turkey (Preliminary Objections)}, A 310 (1995), 20 EHRR 99, para. 62.
\textsuperscript{57} \textit{Supra} n.26.
\end{footnotes}
provisions of the American Declaration on the Rights and Duties of Man applied to its activities in Guantanamo. 58 Indeed, both Israel and the USA have consistently argued that human rights treaties have no extraterritorial effect. 59 The United Kingdom, following the invasion and occupation of Iraq, argued that it was not bound to act in accordance with the European Convention on Human Rights as regards its activities as an occupier in Southern Iraq; in the first place because although the UK might be in effective control of the area for the purposes of being in occupation (and benefiting from the rights accruing to an occupier), it was not for the purposes of the European Convention; and, secondly, because the Convention is a European treaty, which applies in a European ‘legal space’, so that to apply to Iraq would amount to ‘human rights imperialism’. 60 Both these arguments were successful in the English courts. 61 However, neither received the support of the European Court of Human Rights. In its judgment in Al-Skeini and others v. United Kingdom, the Court reiterated what it said in Loizidou (and other earlier cases):

Another exception to the principle that jurisdiction under Article 1 is limited to a State’s own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. 62

The Court continued:

It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State’s military presence in the area. 63

Applying the law to the facts of the case, the Court took note that the USA and UK had been occupying powers within the meaning of Article 42 of the Hague Regulations and had for a period assumed the government of Iraq until authority passed from their vehicle, the Coalition Provisional Authority, to the Interim Iraqi Government. Accordingly, the Court concluded:

[F]ollowing the removal from power of the Ba’ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. Under these exceptional circumstances, the Court

59 Although the US position appears to have softened recently: see Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights, 30 December 2011, at paras 504–507.
63 Ibid., at para. 139.
considers that the United Kingdom through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.64

This is, perhaps, not as explicit as might be hoped, but the implication seems clear: that the UK was in effective control of Southern Iraq and, therefore, individuals within that area were within its jurisdiction under Article 1 of the European Convention. The contrast with the judgment of the UK House of Lords, which held that only persons in the custody of British forces in Southern Iraq, not those shot at checkpoints and during military operations, fell within the UK’s jurisdiction for the purpose of the Convention,65 is clear. However, the Court’s emphasis on the particular facts of the case leaves open the possibility that some situations of belligerent occupation might fall outwith the scope of the Convention.

The argument concerning the essentially regional character of the European Convention was also rejected by the Court.66 And in his Concurring Opinion, Judge Bonello tartly observed that:

I confess myself to be quite unimpressed by the pleadings of the United Kingdom Government to the effect that exporting the European Conventions on Human Rights to Iraq would have amounted to ‘human rights imperialism’. It ill behooves a State that imposed its military imperialism over another sovereign State without the frailest imprimatur from the international community, to resent the charge of having exported human rights imperialism to the vanquished enemy … For my part, I believe that those who export war ought to see to the parallel export of guarantees against the atrocities of war.67

The European Court’s judgment in Al-Skeini, and its earlier decision in Banković68 also serve to delimit the extent to which the Contracting Parties’ obligations under the European Convention extend extraterritorially in situations outside of occupation. In Al-Skeini the Court stated that, although as a rule jurisdiction was territorial:

In certain circumstances, the use of force by a State’s agents operating outside its territory may bring the individual thereby brought under the control of the State’s authorities under the State’s Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad.69

In support of this proposition, the Court referred to a number of its previous decisions, including that in Issa v. Turkey,70 where the Court held admissible allegations that Turkish forces operating in Northern Iraq had detained, and subsequently killed, a

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64 Ibid., at para. 148.
65 Supra n.60.
66 Supra n.62, para. 142.
68 Supra n.14.
69 Supra n.62, para. 136.
70 Appl. no. 31821/96, decision on admissibility, 30 May 2000; Judgment, 16 November 2004.
number of Kurdish shepherds.\textsuperscript{71} To similar effect, the Human Rights Committee, in its
General Comment 31, stated that:

(a) State party must respect and ensure the rights laid down in the Covenant to anyone within
the power or effective control of that State Party, even if not situated within the territory of
the State Party … This principle also applies to those within the power or effective control of
the forces of a State Party acting outside its territory, regardless of the circumstances in which
such power or effective control was obtained, such as forces constituting a national
contingent of a State Party assigned to an international peace-keeping or peace-enforcement
operation.\textsuperscript{72}

The European Court of Human Rights, however, has distinguished situations where
there is an ‘exercise of physical power and control over the person in question’\textsuperscript{73} from
cases such as that in \textit{Bankovič}. That case concerned the bombing of the offices of
Serbian television in Belgrade by NATO forces in 1999, resulting in the death of 16
persons and serious injury to another 16. The Court concluded it did not have
jurisdiction to consider the application as there was no exercise of authority and control
over the victims. They were simply unfortunate enough to be in a building which
NATO forces bombed.

Such a view has been disputed. Françoise Hampson, in particular, has argued that
\textit{Bankovič} was wrongly decided and that the appropriate test should not be control over
territory but ‘control over the effects said to constitute a violation, subject to a
foreseeable victim being foreseeably affected by the act’.\textsuperscript{74} And although the European
Court has subsequently gone some way to modifying its rather dogmatic position in
\textit{Bankovič},\textsuperscript{75} the distinction between exercises of authority and control, and acts of war
remains. By contrast, the Inter-American Commission on Human Rights, applying the
American Declaration on the Rights and Duties of Man, has been willing to exercise
jurisdiction over acts of war committed by a state outside of its territory.\textsuperscript{76} And in the
\textit{Armed Activities in the Territory of the Congo} case, the International Court of Justice
found violations of the International Convention on Civil and Political Rights as

\begin{footnotesize}
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\item \textsuperscript{71} The Turkish forces constituted an invading rather than an occupying army: see C.
\textsuperscript{72} Human Rights Committee, General Comment 31: The Nature of the General Legal
\textsuperscript{73} \textit{Supra} n.62, at para. 138.
\textsuperscript{74} \textit{Supra} n.45, at 570.
\textsuperscript{75} Which did not, in any case, entirely reflect its earlier jurisprudence: see M. Happold,
\textit{‘Bankovič v Belgium and the Territorial Scope of the European Convention on Human Rights’},
\textsuperscript{76} \textit{Disabled People International and others v. US}, Case 9.213, admissibility decision of 22
\textit{International humanitarian law and human rights law} 457

\begin{footnotesize}
regards Uganda’s conduct not only in territory which it had occupied but also in other parts of the Congo.77 No legal reasons, however, were given by the Court for its doing so.78 It is, of course, quite possible that the extraterritorial reach of some human rights treaties is broader than that of others. The main obstacle to a further extension of that of the European Convention on Human Rights would appear to be the European Court of Human Rights’ view that the Convention applies in an ‘all or nothing’ fashion, so that it can only apply in situations where a Contracting Party can guarantee all the rights therein,79 but Al-Skeini seems to have mitigated this rigid approach.80 The matter is likely to come for determination again by the European Court of Human Rights in the context of the inter-state claim brought by Georgia against Russia concerning the latter’s invasion of the former in August 2008.81

In consequence, it would seem that states’ human rights obligations do apply to their extraterritorial conduct in at least two situations: when they are in effective control of areas outside of their national territory (which seems largely assimilable to whether the state was in belligerent occupation of the area); and when they have detained or taken into custody persons outside of their national territory. Arguments have also been made that international human rights law applies more widely, to all extraterritorial uses of force. The use in recent years of drones to undertake ‘targeted killings’ of terrorist suspects by Israel and the USA has increased support for such a view.82 However, although it has some support in the jurisprudence of the International Court of Justice and the American Commission on Human Rights and in legal doctrine, the current case law of the European Court of Human Rights argues the contrary.

77 [2005] ICJ Rep. 165, at 239 and 244–245. The tenor of the Court’s Nuclear Weapons Advisory Opinion would also seem to support such a conclusion, given that it is difficult to imagine a state using nuclear weapons within its national territory or any area within its effective control.

78 The Court simply stated (ibid., at 243), with reference to its Legality of the Wall Advisory Opinion that: ‘The Court further concluded that international human rights instruments are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”, particularly in occupied territories’, which entirely begs the question.

79 Banković, supra n.14, at para. 75.

80 Al-Skeini, supra n. 62, at para. 137.

81 Georgia v. Russia, Appl. no. 38263/08. In its decision on admissibility of 13 December 2011, the Court reserved questions of Russia’s ‘jurisdiction’ for the purposes of Article 1 of the European Convention in South Ossetia, Abkhazia and neighbouring regions, and the interplay of the provisions of the Convention with the rules of international humanitarian law to the merits stage of proceedings.

82 In particular because otherwise extraterritorial uses of force (that is, ‘targeted killings’ using drones and airstrikes, etc.) would be outside of the ambit of international human rights law even if not committed during an armed conflict: see Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, Philip Alston. Addendum: Study on targeted killings, UN Doc. A/HRC/14/24/Add.6, 28 May 2010.
5. SITUATIONS OF THE SIMULTANEOUS APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW

To say that international humanitarian law and international human rights law are applicable simultaneously in situations of armed conflict cannot, however, be the end of the matter. In particular, how are potential conflicts to be avoided or resolved? In such situations the *lex specialis* principle is said to apply. Taken originally from Roman law, this principle provides that *lex specialis derogat legi generali*; that is, the more specific rule prevails over the more general.83 However, precisely what the principle represents has not always been made clear and its application has been subject to cogent criticism.84 Two issues seem particularly problematic: first, whether the principle applies at the level of legal regimes (in which case international humanitarian law might potentially displace human rights law entirely during situations of armed conflict) or as regards particular rules (which would open the possibility to holding that, in certain situations, human rights law is more specific than international humanitarian law); and, secondly, whether the principle is a method for avoiding conflicts of norms, for resolving them, or both.

The International Court of Justice has addressed the relationship between international humanitarian law and human rights law on several occasions and its jurisprudence provides a good starting point for discussion of the issues. As already mentioned, the Court did so first in relation to Article 6 of the International Covenant on Civil and Political Rights in its *Nuclear Weapons* Advisory Opinion. Article 6(1) provides that: ‘Every human being has the inherent right to life… No one shall be arbitrarily deprived of his life.’ International humanitarian law, by contrast, permits the taking of life in certain circumstances.85 Having pointed out that Article 6 was non-derogable and that therefore, in principle, it continued to apply in hostilities, the Court continued to say:

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.86

86 Supra n.22, at 240.
The Court’s statement has been viewed as supporting the view that the relationship between the two bodies of international human rights law and international humanitarian law is one, respectively, of *lex generalis* and *lex specialis*. However, in subsequent cases the Court was more nuanced. In its *Legality of the Wall* Advisory Opinion, the Court stated 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.87

Finally, in the *Armed Activities* case the Court abandoned reference to international humanitarian law as *lex specialis*, reproducing the quote from its Opinion in the *Legality of the Wall* case set out above with the exception of its final sentence, and stating that: ‘It [the Court in the *Legality of the Wall* case] thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration.’88

The International Court of Justice’s statement in the *Legality of the Wall* Advisory Opinion highlights that even when international human rights law and international humanitarian law apply simultaneously they do not have the same scope and do not always regulate the same issues. International humanitarian law has little or nothing to say on some matters governed by human rights law, such as the right to education89 and the right to marry. The reverse is also true. Whereas human rights law talks in broad generalities, particular issues such as the treatment of prisoners of war and of civilians in occupied territories are extensively regulated under international humanitarian law, often in great detail. Human rights law, for example, says nothing about the enlistment of children into formations or organizations subordinate to an occupying Power, nor prohibits propaganda aimed at encouraging Protected Persons’ voluntary enlistment into the armed or auxiliary forces of an occupying Power.90 Neither does it require that the canteens of civilian internment camps sell tobacco or soap ‘at prices not higher than market prices’.91

But what about situations when both bodies of law apply? In its *Nuclear Weapons* Advisory Opinion, the International Court of Justice applied the principle in the context of interpreting a general norm (the prohibition of arbitrary killing in the International Covenant on Civil and Political Rights) by reference to more specific rules (those

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87 *Supra* n.36, at 178.
88 *Supra* n.77, at 243.
89 Although for obvious reasons, the conditions for the enjoyment of this right can be seriously affected in situations of conflict.
90 Articles 50 and 51, Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (1949).
91 Article 96, *ibid.*
governing the use of lethal force in international humanitarian law). International humanitarian law did not displace the human rights treaty norm, which continued to apply; it simply defined the standard for its application in situations of armed conflict. The same, it is argued, can be done in relation to Article 9(1) of the International Covenant, which provides, *inter alia*, that: ‘No one shall be subjected to arbitrary arrest or detention.’ In that way, the legality of detention and internment in armed conflict can be assessed using the yardstick of international humanitarian law.92

Certainly, the Inter-American Commission and Court of Human Rights have interpreted the American Convention on Human Rights, as it applies in situations of armed conflict, by reference to the requirements of international humanitarian law.93 Although originally the Commission maintained it could apply international humanitarian law directly, following the Court’s admonitions, it now has accepted that humanitarian law can only be used in order to interpret the requirements of the American Convention in situations of conflict. As Judge Sergio Garcia Ramirez stated in the *Bámaca Velásquez* case:

> It is not an issue of directly applying [Common] Article 3 … but of admitting the facts provided for this whole system of laws – to which this principle belongs – in order to interpret the meaning of a norm that the Court must apply directly.94

The European Convention on Human Rights, however, is said to be different. Article 2 of the Convention provides an exhaustive list of exceptions to the right to life, with Article 15 requiring derogation from Article 2 to legalize deaths resulting from lawful acts of war. Similarly, Article 5 provides an exhaustive list of exceptions to the right to liberty and security of the person, which do not include detention or internment during an armed conflict or belligerent occupation. Hence, the European Commission on Human Rights held that, in the absence of derogation, the detention of prisoners of war by Turkey during its 1974 invasion of Cyprus was unlawful.95 However, there are signs that the Court’s jurisprudence, at least regarding Article 2 of the European Convention, has developed so as to apply, when it considers appropriate, standards derived from international humanitarian law. In its 2009 judgment in *Varnava and others v. Turkey*, the Grand Chamber of the European Court of Human Rights stated in terms that:

> Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an

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92 Whether this is entirely correct, however, may be doubted.


indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict.96

As Cordula Droege has shown, the European Court in practice distinguishes between killings by state agents committed in situations of normality and those of crisis,97 a distinction made even more apparent in the Court’s recent judgment in Finogenov and others v. Russia.98

However, the extent to which human rights law rules concerning the right to life should be interpreted according to international humanitarian law remains unclear. The cases decided by the European Court of Human Rights have dealt with deaths either as a result of combat between government forces and organized armed groups or of attacks on civilians or the civilian population. As yet, there have been few decisions concerning the killing of members (or suspected members) of organized armed groups when they were not taking a direct part in hostilities. Under international humanitarian law, it is argued, such persons can be targeted at all times if they are exercising a ‘continuous combat function’.99 In the Targeted Killings case, however, the Israeli Supreme Court, drawing on human rights law, did not take an absolute view but admitted their lawfulness in some circumstances.100 International human rights bodies, faced with the necessity to decide individual complaints, may well take a similar view,101 holding the killing of members of organized armed groups legally justified only when other methods of neutralizing them (in particular, through their capture and detention) are not available.

Even if human rights bodies use international humanitarian law to interpret human rights law, they may develop their own perceptions of what international humanitarian law permits. Two examples can be given. The first concerns the idea, advanced in the Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law published by the ICRC that members of organized armed groups falling outside such participation, even if not actively engaged in hostilities, may be considered legitimate targets.102

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96 Varnava and others v. Turkey, Appl. Nos 16064/90, 16065/90, 16068/90, 16070/90, 16072/90 and 16073, Judgment of 2009, para. 185.
98 Appl. Nos 18299/03 and 27311/03, Judgment of 20 December 2011, at paras 212–216. The Court specifically referenced Isayeva (ibid.), to justify its approach. It is highly doubtful that international humanitarian law applied to the siege of the Dubrovka Theatre but this does not negate the argument that the Court is now applying two standards according to the situation.

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armed groups can have a ‘continuous combat function’ so that they are classed as participating directly in hostilities, and, as such, can be targeted at all times. This, it has been argued, is questionable as a matter of international humanitarian law insofar as it is contrary to specific treaty language. A second example also concerns the Interpretative Guidance, which provides that:

the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

This recommendation is justified by reference, not to human rights law, but to ‘the fundamental principles of military necessity and humanity which underline and inform the entire normative framework of IHL’. It has been the subject of considerable criticism, in particular on the grounds that it has no basis in lex lata and that it seeks inappropriately to introduce human rights concepts in international humanitarian law. Nonetheless, it is likely to be attractive to human rights bodies, given its resemblance to the general rule under human rights law that the use of lethal force is only permitted when necessary to achieve a legitimate purpose.

6. CONCLUSION

By abandoning the idea that international humanitarian law, as a branch of law, is lex specialis to human rights law’s lex generalis, the International Court of Justice opened the way to admitting that the relationship can run both ways. For example, torture is prohibited both as a matter of human rights and humanitarian law. However, as none of the humanitarian law instruments defines what torture is, so the definition in human rights law has been used to define the extent of the prohibition in international humanitarian law. What a ‘regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples’ under Common Article 3 might entail has been defined by reference to Article 75 of Additional Protocol I.

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103 Supra n.100, Recommendation IX, at 17.
104 Ibid., at 78.
105 For a particularly intemperate example, see W.H. Park, ‘Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise and Legally Incorrect’, (2010) 47 NYULJILP 769. A more measured critique is Kleffner, supra n.30.
106 On the human rights side, see Article 3, European Convention on Human Rights; Article 7, International Covenant on Civil and Political Rights; Article 5, American Convention on Human Rights; and the Convention against Torture. As regards international humanitarian law, see Common Article 3 of the Geneva Conventions and Article 75, Additional Protocol I.
107 See Prosecutor v. Furundzija, case no. IT-95-17/1, Judgment of the Trial Chamber, 10 December 1998, para. 159.
Protocol I, seen as reflecting customary international law. The content of Article 75, however, was itself inspired by Article 14 of the International Covenant on Civil and Political Rights, so that reference to Article 14 can be made in order to elucidate the content of both Article 75 and Common Article 3 insofar as they relate to criminal proceedings. In other words, when the same matter is governed by both human rights law and humanitarian law, the more general rule (whatever its origin) is interpreted by reference to the more specific. What is important is the relationship between particular norms in the context of their application. As Cordula Droegge has put it: ‘In determining which rule is the more specialized one, the most important indicators are the precision and clarity of a rule and its adaptation to the particular circumstances of the case.’

Applied in such a manner, the lex specialis principle can be seen as an aspect of the ‘principle of systemic integration’ said to be inherent in international law. Because treaties are creatures of international law, they cannot be viewed in isolation but, however wide their subject matter, are subject to limitation and interpretation by reference to the international legal system of which they form part, including other applicable treaty rules. From this perspective, the principle is, as Marko Milanović has put it, not a rule of norm conflict resolution but of norm conflict avoidance. It certainly does not imply the disapplication of one body of law (human rights law) in favour of the other (international humanitarian law) when both govern a matter.

But what happens if the two bodies of law cannot be read together? If they do mandate – or permit – different outcomes? Milanović shows that there are only few rules of norm-conflict resolution in international law, all of which have limited application in the context of the relationship between international humanitarian law and human rights law. However, most inconsistencies between the rules of the two bodies of law are not true conflicts at all, as they do not require states to conduct themselves in different ways. Rather, it is simply that international humanitarian law is the more permissive system; states’ belligerent rights under international humanitarian law are wider than their sovereign rights as limited by human rights law. In such situations, to argue that the two bodies of law are ‘complementary and mutually

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109 Ibid. (albeit only in a footnote).
110 Supra n.24, at 524.
112 McLachlan, ibid., at 280.
113 Ibid., at 313–315.
115 He instances jus cogens, Article 103 of the Charter of the United Nations, conflict clauses in treaties and lex posterior: ibid., at 466.
reinforcing" or, to put it another way, that they act as belt and braces, is to do little more than issue a policy prescription.

In reality, in such cases states have to make a choice as regards which rules they wish to comply (a choice which is likely to be a political one) and take the consequences. There are fundamental incompatibilities between international humanitarian law and human rights law, not only as regards discrete rules but in their theoretical bases. Attempts can be made to reconcile them, to avoid conflicts, but they can only be provisional and on a case-by-case basis. The legal tools available cannot always provide an answer: with absent legislation, conflicts will remain. And in a world of states with differing interests and values, the adoption of new rules governing armed conflict and belligerent occupation will be difficult, if not impossible.

One difference between the two bodies of rules, in particular, remains fundamental. Despite developments over past decades which are said to indicate a 'humanization of humanitarian law', international humanitarian law, in contrast to human rights law, is not based on an individual rights paradigm. Human rights treaties frequently require review of situations of possible human rights violations; for example, by requiring access to a court to challenge the legality of a person’s detention or obliging states to undertake effective investigations of allegations of torture and arbitrary killing. When individuals consider their rights have been violated, they have an individual right to a remedy; that is, to have the matter adjudicated upon, either by a national court or some international body. And if a violation is found, they have an individual right to reparation. This is not to argue that international humanitarian law does not provide for investigations, remedies or reparations; simply that it does not do so at the behest of individuals. It is this difference, even excluding the differences in the substantive protections accorded individuals under the two bodies of law, which will ensure that
individuals continue to bring complaints regarding their treatment in situations of armed conflict before human rights bodies. And even if human rights bodies take the view that states’ human rights obligations in situations of armed conflict are to be interpreted using the yardstick of international humanitarian law, their interpretations of humanitarian law are likely to differ from lawyers advising states’ defence ministries and armed forces, who are likely to continue to be unhappy with such trespasses into what they see as their chasse gardée.