From Legal Theory to Policy Tools: International Humanitarian Law and International Human Rights Law in the Occupied Palestinian Territory

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Introduction

This briefing note aims to assess the interplay between International Humanitarian Law (IHL) and International Human Rights Law (IHRL) in the Occupied Palestinian Territory (OPT),[1] particularly as international agencies are engaged in the protection of Palestinian civilians living under occupation. In so doing, the paper will present a range of legal arguments on the applicability of IHRL considering the current situation in the OPT.

Part I considers international jurisprudence on the extraterritorial application of IHRL. Part II, the main focus of the brief, compares the law of occupation and the extraterritorial effect of IHRL at the theoretical and practical levels: first by charting a tendency in the jurisprudence of the International Court of Justice (ICJ) and in some academic works merely to assert the complementarity and coexistence of IHL and IHRL; and, second, by considering, with reference to domestic case-law, specific norms from both bodies of law which might coexist, clash, or compensate for flaws in either one or the other body of law. Finally, Part III proposes an analysis of the potential interaction of IHL and IHRL in situations of continued occupation and argues for an ongoing inquiry into the potential co-applicability of IHL and IHRL with sound enforcement mechanisms to maximize the protection of the civilian population living under occupation.

The purpose of this note is to provide humanitarian practitioners with a clear understanding of the legal framework available for protecting Palestinian civilians living in the Occupied Palestinian Territory. This framework is based on International Human Rights Law and International Humanitarian Law. These two legal regimes provide a series of rules that attribute obligations and responsibilities for the welfare and dignity of Palestinian civilians. However, these legal regimes are of a different character and scope. Human rights law primarily provides obligations to the state with regard to the welfare of its citizens while humanitarian law in principle articulates obligations of a belligerent for the welfare of enemy civilians or prisoners of war. The role and responsibility of states as well as the means to enforce the rules pertaining to these two regimes are inherently different. This difference is

[1] For the purpose of this paper, the Occupied Palestinian Territory is composed of the Gaza Strip and the West Bank, including East Jerusalem. The paper does not take a definite position on the particular status of the Gaza Strip after the Israeli military re-deployment in September 2005 under its Disengagement Plan. For more information on the Disengagement Plan and its legal implication, please see the Program on Humanitarian Policy and Conflict Research (HPCR) Policy Brief, *Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law (IHL)* November 2004, available at www.ihlresearch.org/opt.

particularly puzzling when the two regimes apply side by side to the same incident, as is often seen in the Occupied Palestinian Territory. This overlap generates a level of confusion that is not conducive to a sound dialogue with the responsible parties on which much of the implementation of these norms relies.

In this note, the core elements of the two regimes will be presented, and their interpretation in the OPT will be reviewed based on a clear understanding of the strengths and weaknesses of the two bodies of law. Ultimately, the aim of this brief is to strengthen the capacity of humanitarian professionals to utilize and negotiate with the law while developing strategies to enhance the protection of civilians.

Part I: The Applicability of International Human Rights Law in the OPT

Part I considers international and domestic jurisprudence on the extraterritorial application of IHRL,[2] the concepts of non-derogable treaty norms and *jus cogens* norms of customary IHRL, before briefly considering the applicability of IHRL to both the Gaza Strip and the West Bank. This Part considers the potential application of IHRL entirely separately from the application of the international law of occupation under IHL.[3] Part II below will consider the potential for interaction in theory and practice between the two branches of law, including the meaning of the maxim that during an armed conflict or occupation, IHL is *lex specialis*[4] in relation to IHRL.

International Human Rights Treaties

Israel is a state party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC), among others. Of these, the ICCPR and CAT contain jurisdictional clauses which might specifically encompass the OPT. Having ratified the ICCPR, Israel has undertaken "to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction…" (emphasis added).[5] The CAT includes the following provision which may include the OPT: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in

[2] For a detailed, comparative study of the extraterritorial impact of international human rights treaties, see Fons Coomans and Menno Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2004.

[3] For a review of the applicable norms under the international law of occupation, please see the HPCR Policy Brief, *Israel's Obligations under IHL in the Occupied Palestinian Territory*, January 2004; and HPCR Policy Brief, *Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory*, July 2004, both available at www.ihlresearch.org/opt, and Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, 1993.

[4] In full, *lex specialis derogat legi generali*, this interpretive maxim holds that a more specific rule will trump more general rules.

[5] International Covenant on Civil and Political Rights 1966 (ICCPR), Article 2(1), available at http://www.ohchr.org/english/law/ccpr.htm.

any territory under its jurisdiction."[6] For these clauses to include the OPT, the Gaza Strip and the West Bank, including East Jerusalem, would have to be considered "under [Israel's] jurisdiction."

Israel contends that none of its international human rights obligations apply to the OPT, a view that is at odds with that of UN treaty monitoring bodies in their Concluding Observations on Israel's periodic reports.[7] It is worth noting that both the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (CESCR) have each underlined the applicability, in their view, of treaty provisions to the OPT, in contrast to Israel's view as stated in its periodic reports.[8]

General Principles of Extraterritorial Application – Jurisprudence and General Comment

The HRC's General Comment No. 31 bolsters the argument that IHRL applies extraterritorially to the OPT:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party…[9]

Jurisprudence of the HRC,[10] the Inter-American Commission on Human Rights,[11] and the European Court of Human Rights (ECtHR)[12] has indicated the potential applicability of

[6] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 2(1), available at http://www.ohchr.org/english/law/cat.htm.

[7] Concluding Observations of the Human Rights Committee: Israel, 18 August 1998, CCPR/C/79/Add.93, at para. 10; Concluding Observations of the Human Rights Committee: Israel, 21 August 2003, CCPR/CO/78/ISR, at para. 11; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 31 August 2001, E/C.12/1/Add.69, at para. 11; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, E/C.12/1/Add.27: all treaty body documents on Israel can be found via a search by country at the UN High Commissioner for Human Rights treaty bodies database at http://www.unhchr.ch/tbs/doc.nsf.

[8] Second periodic report of Israel on the implementation of the ICCPR, 4 December 2002, CCPR/C/ISR/2001/2 *inter alia*, available at http://www.unhchr.ch/tbs/doc.nsf.

[9] HRC, *General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/58f5d4646e861359c1256ff600533f5f?Opendocument.

[10] *Burgos/Delia Saldias de López v Uruguay,* Communication No. 52/1979, UN Doc CCPR/C/OP/1 (1984).

[11] *Coard et al. v the United States*, Case 10.951, Report No. 109/99, 29 September 1999 (relating to effective control over an individual, rather than over territory).

[12] *Loizidou v Turkey* (Preliminary Objections), (Application No.15318/89), (1995) 20 EHRR 99, 23 March 1995, *Loizidou v Turkey (Merits),* (Application No. 15318/89), (1997) 23 EHRR 513, 28 November 1996, *Xhavara and others v Italy and Albania*, (Application no 39473/98), 11 January 2001, *Cyprus v Turkey*, Application No. 2581/94, Judgment, 10 May 2001, *Al-Adsani v the United Kingdom* (Application No. 35763/97), (2002) 34 EHRR 11, 21 November 2001, *Bankovic & others v. Belgium and sixteen other contracting States,* (Application no. 52207/99; admissibility decision), Grand Chamber of the ECtHR, 12 December 2001, *Assandize v Georgia* (Application No. 71503/01) (2004) 39 EHRR 32 , 8 April 2004, *Ilascu and others v Moldova and Russia*, Application no 48787/99, (2005) 40 EHRR 46 July 2004*, Issa & ors v Turkey,* (Application no 31821/96;

IHRL in territories over which a state party has "effective control." In *Burgos/Delia Saldias de López v Uruguay*, the HRC reasoned that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." While the OPT is not "another state" in relation to Israel, it is sensible to reason by analogy that Israel should be bound by IHR treaty commitments in Israel and the OPT alike, without any distinction in the permitted behaviour by Israel's state agents.

The jurisprudence of the ECtHR establishes a test of "effective control" of territory similar to a test of the same name applied by Israel's own Supreme Court when deciding on the applicability of customary IHL, with two important exceptions. The ECtHR's test is based throughout on actual "effective control" of a territory and is a one-part test, whereas the Supreme Court's test (employed in *Leah Tsemel, Attorney, et al. v. the Minister of Defence and others*)[13] can be met by actual or potential control of a territory and is a three-part, cumulative test. It requires the actual presence of hostile forces in the territory, their potential to exercise effective powers of government in the area, and the inability of the legitimate government of the area to exercise its sovereign authority over the territory.

The ECtHR test might be studied for its analogous relevance to Israel and the OPT. The ECtHR, which is not bound by its previous decisions, expanded and contracted its test in cases with different circumstances. In *Cyprus v Turkey*,[14] the European Commission of Human Rights held that the jurisdictional provision in Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) bound High Contracting Parties to "secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised on its own territory or abroad."[15] In *Loizidou v Turkey*,[16] the ECtHR found that the ECHR's object and purpose permits State responsibility where "as a consequence of military action – whether lawful or unlawful – [a contracting party] exercises effective control of an area outside its national territory."[17] When it reached the merits, the ECtHR determined that the "effective overall control" exercised by Turkish forces over northern Cyprus was sufficient to establish State responsibility for violations of ECHR rights.[18] In a later case, *Cyprus v Turkey*,[19] the ECtHR held that Turkey's "effective overall control" of northern Cyprus meant that acts of the Turkish administration in Cyprus could be imputed to Turkey, so that Turkey was responsible for violations of the ECHR. To hold Cyprus responsible for such violations when it lacked effective control in that area of Cyprus "would result in a regrettable vacuum

admissibility decision), 30 May 2000, Issa *& ors v Turkey*, (Merits stage), (2005) 41 EHRR 27 16 November 2004, *Öcalan v. Turkey* (Application No. 46221/99), (2005) 41 EHRR 45 12 May 2005. All ECtHR cases are available at http://cmiskp.echr.coe.int/tkp197/default.htm.

[13] *Leah Tsemel, Attorney, et al. v. the Minister of Defence and others*, H.C.J. 593/82, 13 July 1983, available at www.court.gov.il.

[14] *Cyprus v Turkey* (Application no 6789/74 & 6950/75) ECommHR, 26 May 1975, 2 DR (1975).

[15] *Ibid*, para. 36.

[16] *Loizidou v Turkey* (Preliminary Objections), ECtHR, 23 March 1995, Series A vol. 310.

[17] *Ibid*, para. 62.

[18] *Loizidou v Turkey (Merits),* 28 November 1996, para. 56.

[19] *Cyprus v Turkey* (Application no 25781/94), ECtHR, 10 May 2001.

in the system of human-rights protection."[20] *Bankovic & others v. Belgium*[21] restricts the test, perhaps anomalously when considered in the light of previous and more recent ECtHR judgments on the extraterritorial effect of IHRL. In that case, the NATO bombing of a media station in Belgrade was not within the "essentially regional context" or the "*espace juridique* [legal space]*"* of the ECHR and its Contracting States. However, *Issa v Turkey*,[22] applies this test differently, with the ECtHR holding that once individuals came within an individual area which was within the effective control of a state party to the ECHR, those individuals were deemed to be within the legal space of that state and of the ECHR.

The Extraterritorial Application of IHRL to the OPT

The ICJ in its Advisory Opinion on the *Legal Consequences of the construction of a wall in the Occupied Palestinian Territory*,[23] held that Israel's obligations under international human rights law applied to its military occupation of the West Bank. At paragraph 109, the ICJ reasons somewhat weakly that, given the object and purpose of the ICCPR, "it would seem natural that" states parties would be bound by its provisions even when they are exercising jurisdiction outside their national territory.[24] From the *travaux préparatoires* of the ICCPR, the ICJ argues that the drafters did not intend to allow states to escape from their obligations if they were to exercise jurisdiction outside their national territory. The ICJ goes on to conclude that both the ICCPR and the ICESCR bind Israel in relation to the OPT.[25]

The Supreme Court of Israel has applied IHRL to cases involving the OPT. It considered the competing claims of freedom of movement and freedom of religion in *Bethlehem Municipality & 21 others v. The State of Israel – Ministry of Defense*;[26] conditions of detention for security detainees in *Center for the Defense of the Individual founded by Dr. Lota Salzberger et al. v. Commander of the IDF Forces in the West Bank*;[27] and liberty and security of the person, specifically the length of time for which a detainee can be held without access to a judge to determine the lawfulness of his or her detention, in *Marab v IDF Commander in the West Bank*.[28] On occasion the Supreme Court of Israel has applied both IHRL and IHL concurrently, as will be discussed in Part II below.

Conclusion to Part I

[20] *Ibid*, para. 78.

[21] *Bankovic & others v. Belgium and sixteen other contracting States,* (Application no. 52207/99; admissibility decision), Grand Chamber of the ECtHR, 12 December 2001.

[22] *Issa & ors v Turkey,* (Application no 31821/96; admissibility decision), 30 May 2000, *Issa & ors v Turkey*, (Merits stage), (2005) 41 EHRR 27 16 November 2004.

[23] *Legal Consequences of the construction of a wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, available at www.icj-cij.org.

[24] *Ibid*, para. 109.

[25] *Ibid*, paras. 111-112.

[26] *Bethlehem Municipality & 21 others v. The State of Israel – Ministry of Defense*, H.C.J. 1890/03, Supreme Court of Israel Sitting as the High Court of Justice, February 3, 2005, available at www.court.gov.il.

[27] *Center for the Defense of the Individual founded by Dr. Lota Salzberger et al. v. Commander of the IDF Forces in the West Bank***,** Supreme Court Sitting as the High Court of Justice, HCJ 3278/02, April 25, 2002; July 28, 2002, October 15, 2002, available at www.court.gov.il.

[28] *Marab and Others v IDF Commander in the West Bank*, Supreme Court of Israel Sitting as the High Court of Justice, HCJ 3239/02, April 18, 2002; July 28, 2002, available at www.court.gov.il.

It is strongly arguable that non-derogable IHR treaty norms and *jus cogens* rules of IHRL apply to the OPT and bind Israel extraterritorially due to its ongoing control of the area. It is also arguable, based on the jurisprudence of the Human Rights Committee and analogous tests of the ECtHR and the Inter-American Commission on Human Rights, that all IHR treaty law applies in areas where a state party to those treaties has "effective control." This argument should apply not only to the ICCPR and the ICESCR, as identified by the ICJ in its Advisory Opinion on the Wall, but also to all IHR treaties to which Israel is a state party.

The extent to which Israel is equally bound by the extraterritorial impact of IHRL in the Gaza Strip and the West Bank, including East Jerusalem, may vary according to the extent of "effective control" Israel has in each area. The policy brief points to the risk of an "accountability deficit" in both IHL and IHRL if neither Israel nor the Palestinian Authority can be held accountable for the civilian protection and human rights of the population in the Gaza Strip. The Palestinian Authority cannot be held accountable for violations of IHRL through the treaty reporting system of the UN, as this is restricted to states parties of the treaties in question. The extent of its own effective control may be limited by issues of funding and factional disagreements. This policy brief emphasizes the need for a framework of accountability in IHRL for violations of human rights in the OPT.

Part II: IHL and IHRL in the OPT – Comparisons and Interactions

IHL applies in situations of armed conflict (whether international or non-international) and in situations of occupation.[29] IHRL applies at all times, but allows for the potential for states to derogate from certain treaty obligations at a time of "public emergenvcy threatening the life of the nation" under the conditions set out in Article 4(1) and 4(3) of the ICCPR. Some IHRL norms are non-derogable, or are considered *jus cogens* (peremptory) in customary international law, such that they bind states regardless of the circumstances.

While both sets of norms may be held to apply to the OPT, subject to the findings of "partial or total occupation"[30] or "effective control,"[31] they have different implications. For example, the obligations of an occupying power under the Hague Regulations 1907 and the Fourth Geneva Convention 1949 to facilitate *inter alia* humanitarian assistance[32] are distinct from the right to food and to an adequate standard of living in the ICESCR. In IHL these are conceived as an obligation to the class of protected persons, whereas in IHRL these rights apply on the basis of the relationship between an individual and the state. This section aims to trace the potential conflicts and coexistence between IHL and IHRL in theory and in practice.

[29] Common Article 2(1) and (2), Geneva Conventions 1949.
[30] Common Article 2(2), Geneva Conventions 1949.
[31] See the discussion of ECtHR jurisprudence in Part II, *supra.*
[32] For the "duty of ensuring the food and medical supplies of the population…," see Article 55, Fourth Geneva Convention 1949; and for the "duty of ensuring and maintaining…the medical and hospital establishments and services, public health and hygiene in the occupied territory…," see Article 56, Fourth Geneva Convention 1949.

In two Advisory Opinions, *Legality of the Threat or Use of Nuclear Weapons*[33] and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[34] the ICJ has held that IHRL can be applied in situations to which IHL also applies. In the *Nuclear Weapons* case, the ICJ held that the protections of the ICCPR did not cease in situations of armed conflict unless a state party had derogated from certain rights as provided by Article 4 of the ICCPR. The ICJ held that IHL is the applicable *lex specialis*: It sets the scope of IHRL obligations in situations of armed conflict. This *lex specialis* rule is asserted rather than explained in the *Nuclear Weapons* Advisory Opinion: Article 6 of the ICCPR (the right not to be deprived arbitrarily of one's life) is non-derogable, and the ICJ held that it therefore applied to situations of armed conflict such that, even during hostilities, it is forbidden *arbitrarily* to deprive a person of his or her life. However, as IHL is *lex specialis* (or specific) to situations of armed conflict, it defines the meaning of "arbitrarily" where IHRL and IHL coexist: the specific regime of IHL trumps the more general norms of IHRL. The *lex specialis* rule does not oust the application of IHRL: IHRL can continue to apply in situations of armed conflict, but its scope is set by IHL norms. The ICJ did not explain how the language of IHL might define the concept of arbitrary deprivation of life in violation of Article 6 of the ICCPR: the *Nuclear Weapons* Advisory Opinion shows a tendency merely to assert the coexistence of IHL and IHRL, without studying the likely practical results of the interaction between the two bodies of law.

The Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* also asserts the applicability of the ICCPR and the ICESCR to the West Bank, seeming to ignore the applicability of ICERD, CEDAW, CAT and the CRC, to which Israel is also a state party. At paragraph 106 of the Advisory Opinion, the ICJ hypothesizes about three possible situations in which IHL and IHRL might interact: (i) some rights may be exclusively matters of IHL; (ii) others may be exclusively matters of IHRL; (iii) others may be matters of both these branches of international law. It is regrettable that the ICJ did not attempt to give concrete examples of norms which fall into each of the three categories. Without such an attempt, the interaction between IHL and IHRL may remain a matter of academic assertion only.

The European Court of Human Rights in *Isayeva v Russia*[35] considered violations of the ECHR in a complaint situated within the non-international armed conflict in Chechnya. The applicant adduced evidence of violations of common Article 3 of the Geneva Conventions 1949 and of Article 13(2) of the Protocol II Additional to the Geneva Conventions of 1949. The ECtHR considered concepts such as the principle of distinction between combatants and civilians in its judgment that there had been violations of Article 2 of the ECHR (right to life) in respect of the applicant's relatives and in respect of the state's failure to conduct an effective investigation into the killings, which also led to a violation of Article 13 of the ECHR. However, the ECtHR firmly applied its jurisprudence relating to Article 2 and Article 13: it used the language of IHL but did not explicitly adopt the principle that IHL was *lex specialis* to IHRL. A similar technique was adopted in *Ergi v Turkey*,[36] which involved the accidental killing of a female civilian in a military operation. These ECtHR cases, among

[33] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ Reports 1996, para. 26.

[34] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004, *supra*, paras. 101-106.

[35] *Case of Isayeva v Russia*, Application No. 57950/00, European Court of Human Rights, 24 February 2005, available at http://cmiskp.echr.coe.int/tkp197/default.htm.

others, show that IHL and IHRL can be co-applicable in situations of armed conflict, and in particular that IHRL on the right to life interacts with the IHL principles of distinction between civilians and combatants. However, neither case systematically addresses the potential interaction of IHL and IHRL in other contexts, such as the law of occupation.

The ICRC Study on Customary International Humanitarian Law (hereinafter "the ICRC Study")[37] draws on the jurisprudence of UN treaty bodies and international human rights tribunals in its chapter 32 on fundamental guarantees. This chapter might be said to shift the balance between IHL and IHRL as defined in the *lex specialis* rule, so that IHRL infuses customary norms of IHL, rather than IHL defining the scope of norms of IHRL.[38] The ICRC Study argues that the rules in chapter 32 apply to international and non-international armed conflicts, but IHRL is used to define torture and degrading treatment (Rule 90), enforced disappearances (Rule 98), fair trial standards (Rule 100), and conditions permitting the deprivation of liberty (Rule 99). The Study tends to demonstrate that IHL and IHRL can be mutually influencing. However, the ICRC Study does not deal in detail with the international law applicable to situations of occupation, so it offers limited analysis to the precise interaction between IHL and IHRL in the OPT.

The UN Sub-Commission on the Promotion and Protection of Human Rights has also studied the interaction between IHL and IHRL, from a primarily academic perspective.[39] One of the study's premises is that "[t]he notion of *lex specialis* does not place HRL 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."[40] The study points to a potential mutual reinforcement between the two sets of norms, while noting that some IHL concepts, such as "military necessity," cannot easily translate into IHRL, and that IHRL's NGO advocacy framework is not available to bolster IHL. The fulcrum of disagreement between IHL and IHRL is expressed as follows:

> Violating IHL is by definition violating human rights, while ensuring respect for IHL does not necessarily ensure respect for all human rights.[41]

With specific reference to situations of occupation, the study's authors see a complete match between the IHL obligations of an occupying power and its ability to implement IHRL. The occupying power's ability to implement both sets of norms is dependent upon its territorial

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[36] *Ergi v Turkey*, Application No. 23818/93, 28 July 1998, see para. 9 for references to "incidental loss," "civilian life," "all feasible precaution."

[37] Jean Marie Henckaerts, and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules,* International Committee of the Red Cross, Cambridge University Press, 2005.

[38] Heike Krieger, A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study, 11 *Journal of Conflict and Security Law* 265 (2006), at section 3.4.

[39] Sub-Commission on the Promotion and Protection of Human Rights, *Working Paper on the relationship between human rights law and international humanitarian law by Françoise Hampson and Ibrahim Salama*, E/CN.4/Sub. 2/2005/14, 21 September 2005, available at www.ohchr.org ('Human Rights Bodies' – 'Sub-Commission on the Promotion and Protection of Human Rights'-'Documents').

[40] *Ibid*, para. 6.

[41] *Ibid*, para. 9.

control.[42] The authors emphasize that "[t]erritorial control can take the form of military occupation, control without occupation, or temporary control."[43]

Two leading Israeli international law scholars provide one of the most thorough legal analysis of this issue, raising a number of interpretations that could be useful to practitioners. Ben-Naftali and Shany argue that an occupying power has responsibility for the human rights of the population in the territory over which it exerts potential or actual effective control, a test based in part on the *Hostages* case and *Tsemel*'s tripartite test.[44] They contend that IHL and IHRL are "on a continuum, rather than a dividing line" because of their shared purpose: the promotion of human dignity.[45] These arguments sound like assertions, but Ben-Naftali and Shany develop the idea further. They investigate the potential coexistence of IHL and IHRL in four different contexts: [46]

(a) In situations where there is a direct conflict between IHL and IHRL, Ben-Naftali and Shany argue that IHL should generally prevail, e.g. IHL's permitted targeting of combatants versus IHRL's provisions on the right to life, or IHL's provision for internment or assigned residence in the law of occupation versus IHRL on freedom of movement and liberty and security of the person;[47]

(b) In situations which are unregulated or only sparsely regulated by either IHL or IHRL, such as IHL's partial regulation of the conditions of detention in prisoner of war (POW) camps, IHRL should fill the gap;[48]

(c) In situations where IHL influences the interpretation of IHRL, IHL should be *lex specialis*, so that the relevant right is defined in terms of IHL. Ben-Naftali and Shany suggest many examples, including the provision for internment or assigned residence in the Fourth Geneva Convention "trumping" the ICCPR's freedom of movement provisions;[49] and

(d) In situations where IHRL influences the interpretation of IHL, the importance of IHRL "increases in direct proportion to the length of the occupation,"[50] so that the humanitarian obligation to provide medical facilities in Article 56 of the Fourth Geneva Convention are construed in the light of the right to the best attainable standard of physical and mental health in Article 12 of the ICESCR.[51]

In addition to the scholarship above, other recent developments have shaped this debate. In December 2006, the Supreme Court of Israel (hereinafter "the Court") issued a judgment in

[42] *Ibid*, para. 83.
[43] *Ibid*, para. 83.
[44] Yuval Shany and Orna Ben-Naftali, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 Israel Law Review 17-118 (2003-2004), p. 84.
[45] *Ibid,* at p. 85.
[46] *Ibid,* at p. 87.
[47] *Ibid*, at pp. 87-88.
[48] *Ibid*, at p. 88.
[49] *Ibid*, at p. 89.
[50] *Ibid*, at p. 89.
[51] *Ibid.*

Public Committee against Torture in Israel et al. v. Government of Israel et al.,[52] ruling that the Israeli Defense Forces (IDF)'s policy of "targeted killings" was not necessarily unlawful as a matter of customary international law, but that each individual "targeted killing" must be assessed individually against the framework of customary international law. The Court decided that IHL and IHRL applied concurrently, with IHL as the *lex specialis*, and IHRL available to fill gaps in IHL:[53] "[H]uman rights are protected by the law of armed conflict but not to their full scope."[54] The Court reviewed its case-law on the interaction between IHL and IHRL and concluded that some "balancing" was needed between "the relativity of human rights and the limits of military needs."[55]

The Court rejected Israel's proposed three-part distinction between combatants, civilians, and "unlawful combatants," holding that only the IHL categories of combatants and civilians applied.[56] The Court then used the principle of proportionality to argue that while IHL may not require that a potential target be arrested rather than killed, the IDF should consider the possibility of arrest, interrogation, and trial of a suspect rather than a targeted killing.[57] This meaning of proportionality is closer to that in IHRL (where proportionality involves an individualized inquiry about the impact of a proposed restriction of a right on the potential victim of a violation) than in IHL (where proportionality balances the likely military advantage of a proposed attack against the likely harm to civilians or civilian infrastructure). The Court used the IHL meaning of proportionality at paragraph 46, where it considered the risks to passers-by of firing at a Palestinian sniper shooting from his porch (an attack the Court considered proportionate) versus the risks to civilians of bombing a building from the air, harming scores of civilians inside (which the Court considered disproportionate).[58] The Court also used IHRL concepts of thorough, independent investigation into a "targeted killing" – a concept more frequently found in the case-law of international bodies on the adjudication of IHRL treaties, to which the Court refers, than in IHL.[59]

The Supreme Court of Israel has applied both IHL and IHRL in earlier cases: it balanced the competing claims of freedom of movement and freedom of religion in *Bethlehem Municipality & 21 others v. The State of Israel – Ministry of Defense*;[60] it briefly considered IHRL on conditions of detention for security detainees in *Center for the Defense of the Individual founded by Dr. Lota Salzberger et al. v. Commander of the IDF Forces in the West Bank*;[61] and studied the IHRL concept of liberty and security of the person, specifically the length of time for which a detainee can

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[52] *Public Committee against Torture in Israel et al. v. Government of Israel et al.* , Supreme Court of Israel sitting as the High Court of Justice, HCJ 769/02, 14 December 2006.
[53] *Ibid*, at para. 18.
[54] *Ibid*, at para. 22.
[55] *Ibid.*
[56] *Ibid*, at para. 28.
[57] *Ibid*, at para. 40.
[58] *Ibid*, at para. 46.
[59] *Ibid*, at para. 40.
[60] *Bethlehem Municipality & 21 others v. The State of Israel – Ministry of Defense*, H.C.J. 1890/03, Supreme Court of Israel Sitting as the High Court of Justice, February 3, 2005, available at www.court.gov.il.
[61] *Center for the Defense of the Individual founded by Dr. Lota Salzberger et al. v. Commander of the IDF Forces in the West Bank*, Supreme Court Sitting as the High Court of Justice, HCJ 3278/02, April 25, 2002; July 28, 2002, October 15, 2002, available at www.court.gov.il.

be held without access to a judge to determine the lawfulness of his or her detention, in *Marab v IDF Commander in the West Bank*.[62] However, there was little or no discussion of the precise interaction between IHL and IHRL in these cases, or of whether one branch of law might modify the other. If IHRL was held to apply, its standards were cited alongside those of the Hague Regulations 1907 and the Fourth Geneva Convention 1949.

The following three instances of direct contradiction between IHL and IHRL have not been considered in detail in case-law or academic debate.

1. Case-law and academic debate have not reviewed the potential conflict between Article 43 of the Hague Regulations 1907, which provide that an occupying power must respect "unless absolutely prevented, the laws in force in the country," and requirements in CEDAW for example to legislate to prevent discrimination against women, or in CAT formally to prohibit torture. Such a conflict may limit the extent to which a long-term occupying power can satisfy both IHL and IHRL.

2. None of the cases cited here has addressed the intersection between a state's obligations in ICESCR and the obligations in Articles 55 and 56 of the Fourth Geneva Convention 1949 to facilitate food and medical supplies and services. The IHL obligations on an occupying power have immediate effect, whereas the ICESCR is based on the concept of progressive realization of economic, social and cultural rights (Article 2(1)) and specifically permits discretion to developing countries on the extent to which non-nationals will be permitted to benefit from the rights in the Covenant (Article 2(3)).

3. The right to self-determination (Article 1(1) of the ICCPR and the ICESCR) is the most glaring contradiction between the IHL of occupation and IHRL. This policy brief does not attempt to reconcile the two branches of law on this divisive subject, but it notes the failure of international and national jurisprudence and academic commentators systematically to engage with this contradiction.

It is essential to study examples where IHRL might fill gaps where IHL fails to regulate, for example in liberty and security of the person as in *Marab v IDF Commander in the West Bank* above. Such gap-filling was proposed by the Supreme Court of Israel in *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, but the concept of gap-filling was cited rather than unpacked.[63] The Court did not consider a method for deciding when IHL had *lacunae*, and when IHRL might be appropriate to define them. This policy paper proposes further systematic study of the interaction between IHL and IHRL. Only when the varied interaction between the two branches of law is understood can its application to the OPT result in meaningful enforcement of civilian protection.

[62] *Marab and Others v IDF Commander in the West Bank*, Supreme Court of Israel Sitting as the High Court of Justice, HCJ 3239/02, April 18, 2002; July 28, 2002, available at www.court.gov.il.

[63] *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, Supreme Court of Israel sitting as the High Court of Justice, HCJ 769/02, para. 18.

Part III: Conclusion – Case-by-Case Inquiry, Ongoing Analysis

This policy brief traced jurisprudence and the General Comments and Concluding Observations of UN treaty bodies to argue for the extraterritorial applicability of IHRL to the OPT, while considering Israel's consistent argument against such extraterritorial effect. Part II reviewed ICJ Advisory Opinions on the interaction between IHL and IHRL, considered the *lex specialis* rule, and argued against simplistic assertions that IHL and IHRL are coexistent. In a review of domestic case-law and academic opinions, Part II also argued for a detailed, case-by-case inquiry as to the precise interaction between IHL and IHRL norms and listed three situations of conflict between these bodies of law.

The coexistence of IHL and IHRL should not be uncritically assumed: instead, practitioners should build upon the framework developed by scholars such as Ben-Naftali and Shany in locating precisely where the two legal regimes conflict, and where innovative interprations of the law can enhance the scope of protection. In situations where IHRL provides greater detail to fill gaps in IHL, or where one body of law influences the application of the other, practitioners may push forward and strengthen the legal methodologies illustrated here to create a more meaningful and robust system of legal protection and enforcement for civilians living in occupied territory.

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