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The Role of International Human Rights Law in the Interpretation of the Fourth Geneva Convention

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THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN THE INTERPRETATION OF THE FOURTH GENEVA CONVENTION

By Kubo Mačák[*]

I. INTRODUCTION

The four 1949 Geneva Conventions form the cornerstone of contemporary international humanitarian law ("IHL"). Their rules are essential for the protection of persons who are not, or are no longer, taking a direct part in hostilities when they find themselves in the hands of a party to an armed conflict: specifically, the wounded and sick,[1] the shipwrecked,[2] prisoners of war,[3] and civilians.[4] At the same time, these four Conventions are among the very few international treaties that have been universally ratified. Understanding the exact meaning of their prescriptions is thus crucially important for all actors engaged in armed conflicts around the world, including State armed forces and non-State armed groups, as well as humanitarian organizations.

The International Committee of the Red Cross (the "ICRC") was closely involved in the expert discussions and diplomatic negotiations that resulted in the adoption of the four Conventions in August 1949.[5] In the 1950s, it then

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1 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, 75 *UNTS* 970.

2 Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, *id.* at No. 971.

3 Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, *id.* at No. 972.

4 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, United Nations Treaty Series, *id.* at No. 973 (hereafter 'Fourth Convention').

5 The 1949 Conventions were preceded by the 1929 Geneva Conventions on the wounded and sick, and on prisoners of war. The ICRC initiated the revision process of these Conventions and drew up drafts of the four new Conventions, which were then successively

published commentaries on each of those Conventions — sometimes called the 'Pictet Commentaries' in reference to the main editor and co-author of the four volumes — as part of its work to disseminate and clarify IHL.[6] Currently, the ICRC is carrying out a major project to update those commentaries, which was launched in 2011[7] and which has so far seen the publication of updated Commentaries on the first three Conventions.[8]

By updating the original commentaries, the ICRC aims to provide contemporary interpretations and guidance that consider the issues and challenges encountered in armed conflicts in recent decades, as well as relevant legal developments. Of all the areas of international law, few have undergone more dramatic growth than international human rights law ("IHRL"). In 1949, this body of law was still in its infancy; in fact, one could say it consisted of a single brief non-binding text adopted in the preceding year, the Universal Declaration of Human Rights.[9] Today, it is a rich branch of international law, entailing a dense web of legal rules as well as a complex framework of regional and global institutions, procedures, and mechanisms.

The growth of IHRL over time and its significance in the current landscape of international law pose the question of its role in the interpretation of the Geneva Conventions. This question is the most pronounced in the context of the Fourth Convention, the protective ambit of which relates principally to civilians that are in the power of one of the Parties to an armed conflict.[10] The vertical nature of that relationship thus resembles the normative structure of

discussed with National Societies in 1946, government experts in 1947, and at the International Conference of the Red Cross in Stockholm in 1948. This process culminated in the 1949 Diplomatic Conference. For further details, *see* F. Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 313–314 (2003).

6 ICRC, *The Geneva Conventions of 12 August 1949: Commentary*, Vols I–IV (J. S. Pictet, ed. 1952–1960).

7 J. M. Henckaerts, "Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the twenty-first century", 94 (888) *Int'l Rev. R. C.* 1551 (2021).

8 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field* (2016); ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, (2017); ICRC, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War*, (2020) (hereafter the "ICRC, *Commentary on the Third Convention*").

9 Universal Declaration of Human Rights, proclaimed by UN General Assembly Res. 217 A, Paris, 10 Dec. 1948.

10 *See* Fourth Convention, *supra* note 4, at Art. 4. Additionally, a subset of the rules in the Convention covers the entire population of each of the countries in conflict, meaning that these provisions protect the inhabitants also vis-à-vis their own State of nationality. *See id.*, at Arts. 4(3), 13–26.

IHRL, which in its core protects individuals *vis-à-vis* the States under whose jurisdiction they find themselves.[11]

Against this background, this article discusses some of the open questions and challenges, related to the role of IHRL in the interpretation of the Fourth Convention.[12] It does not attempt to provide the final word on this subject – any such ambition would be ill-guided given the complexity of the issues involved and the developing nature of the field.[13] Instead, the article is intended as a contribution to the academic and practitioners' discussions concerning the methodology of treaty interpretation, in particular as it applies to IHL treaties.[14]

Overall, the article argues that while IHRL cannot be ignored in the interpretation of the Fourth Convention, reliance on its prescriptions is contingent on factors that include the scope and precise legal basis of the relevant IHRL rules, as well as the particular context in which the Convention operates in a given set of circumstances. This argument is divided into two main parts. The first one positions the Convention and IHRL in the wider framework of international law, in light of the relevant treaty interpretation rules and methodology for resolving conflict between rules originating in different legal regimes (section II). On that basis, the article then analyses how IHRL affects the interpretation of the Convention in the key contexts that it governs, i.e., the treatment of protected persons in a belligerent's own territory; matters of belligerent occupation; and matters of detention (section III).

11 *See, e.g.,* M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, 2 (2011).

12 The scope of this article is limited to those provisions of the Fourth Convention that apply during international armed conflicts, *i.e.*, all except common Article 3. For a brief general overview of the ICRC's approach taken with respect to the relationship between IHL and IHRL in the earlier updated commentaries, *see* ICRC, *Commentary on the Third Convention*, *supra* note 8, Introduction, at paras. 99–105.

13 *See also* ICRC, *Commentary on the Third Convention*, *supra* note 8, Introduction, at para. 100 ("The interface of humanitarian and human rights law remains a complex issue that will undoubtedly be subject to evolution and clarification going forward").

14 *See* among other recent publications J. M. Henckaerts & E. Pothelet, "The interpretation of IHL treaties: Subsequent practice and other salient issues" in *Law-making and Legitimacy in International Humanitarian Law*, 150–169 (H. Krieger & J. Püschmann eds., 2021); J. M. Henckaerts, K. Mačák, M. Orkin, & E. Policinski, "ICRC Perspectives on the Interpretation of the Third Geneva Convention More Than Seventy Years after Its Adoption", in *Prisoners of War in Contemporary Conflict* (C. Koschnitzky & M. N. Schmitt eds, 2022).

II. POSITION OF THE FOURTH CONVENTION AND HUMAN RIGHTS LAW IN THE WIDER FRAMEWORK OF INTERNATIONAL LAW

A. As an international treaty, the Fourth Convention must be interpreted in light of the entire framework of applicable international law, which includes IHRL

The first question that needs to be answered concerns the relevance of IHRL as a separate branch of international law for the interpretation of the Fourth Convention as an IHL treaty. One can imagine an objection to the effect that as a treaty that forms part of the corpus of IHL, the Convention should be interpreted only in the context and against the background of other IHL rules. On this approach, non-IHL rules – including IHRL ones – would not have a role in the interpretive exercise concerning IHL rules.

However superficially appealing, such approach would be fundamentally flawed. Modern international law is a complex and interconnected system, and none of its parts can be isolated from the rest. To begin with, the Geneva Conventions, along with the rest of IHL, are subject to rules of general international law, which include the generally applicable rules on the interpretation of treaties, codified in the 1969 Vienna Convention on the Law of Treaties (VCLT).[15]

Key among these treaty interpretation rules is Article 31(3)(c) of the VCLT, which prescribes that in the interpretation of any rule of international law, "any relevant rules of international law applicable in the relations between the parties" must be taken into account. The drafting history of this provision confirms that the 'relevant rules' are not restricted to customary rules but also include treaty rules.[16] In effect, this means that the interpretation exercise must be conducted taking into account the entire framework of applicable international law.[17] This is also the approach of the International Court of Justice (the "ICJ"), which held in the *Namibia* case that "an international instrument has to be interpreted and applied within the framework of the *entire legal system* prevailing at the time of the interpretation".[18]

15 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 *UNTS* 18232.

16 *See, e.g.,* R. K. Gardiner, *Treaty Interpretation*, 301–302 (2008); M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 433 (2009).

17 *See also* Villiger, *supra* note 16, at 432.

18 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 Jun. 1971, *ICJ Reports* 1971, at 16, para. 53 (emphasis added).

The vast majority of provisions in the Fourth Convention apply only during international armed conflicts, as is the case of the other three Conventions. One notable exception is common Article 3, which governs non-international armed conflicts, and there are several other provisions in the Fourth Convention, the scope of which extends to peacetime situations.[19] However, on the whole, the Convention was designed for and is applicable to situations that qualify as international armed conflicts, including occupation, as defined in common Article 2.

Conversely, it is sometimes said that IHRL was designed for the environment of a normal State in the condition of peace.[20] However, it is now generally accepted that IHRL applies both in time of peace and during armed conflicts. This has been confirmed in a consistent line of case-law of the ICJ, consisting of the *Nuclear Weapons* and *Wall* advisory opinions and the *Armed Activities* case.[21] It is also the view of most States[22] – Israel being an exception[23] – as well as of the International Law Commission (ILC)[24] and various human rights mechanisms.[25]

19 *See, e.g.,* common Art. 1, or Arts. 14 & 144 of the Fourth Convention, *supra* note 4.

20 *See, e.g.,* C. Greenwood, "Human Rights and Humanitarian Law – Conflict or Convergence?", 43 *Case Western Reserve J. Int'l L.* 491, 495 (2010).

21 *See, e.g.,* ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 Jul. 1996, *ICJ Reports* 1996, at 226, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 Jul. 2004, *ICJ Reports* 2004, at 136, para. 106; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 Dec. 2005, *ICJ Reports* 2005, General List No. 116, at paras. 215–220.

22 *See, e.g.,* H. Duffy, "Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication" in *Law Applicable to Armed Conflict* at 39 (Z. Bohrer, J. Dill, & H. Duffy eds., 2020).

23 *See, e.g.,* Israel, Comments from the State of Israel on the International Law Commission's *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts* as adopted by the Commission in 2019 on first reading, at para. 9, available at https://legal.un.org/ilc/sessions/73/pdfs/english/poe_israel.pdf.

24 ILC, Draft Articles on the Effects of Armed Conflicts on Treaties (2011), at 126–127, paras. 49–50.

25 *See, e.g.,* Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, at para. 11; General Comment No. 35 – Article 9: Liberty and Security of person, UN Doc. CCPR/C/GC/35, 16 Dec. 2014, at para. 64; General Comment No. 36 – Article 6: Right to life, UN Doc. CCPR/C/GC/36, 3 Sept. 2019, at para. 64; CESCR, Concluding Observations: Israel, UN Doc. E/C.12/1/Add.90, 26 Jun. 2003, at para. 31; Committee Against Torture, General Comment No. 2: Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 Jan. 2008, at para. 5; Committee on the Elimination of Discrimination against Women, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. CEDAW/C/GC/28, 16 Dec. 2010, at para. 11.

B. Reliance on IHRL treaties is contingent on their scope of application and ratification status

IHRL is a highly codified branch of international law, which consists of a diverse and well-developed body of treaty law. This is in line with the original intentions and expectations of the architects of the UN human rights programme, who had meant for IHRL to become "primarily, perhaps even exclusively, conventional law".[26] Accordingly, the present section focuses on IHRL treaty law, although it should be noted that certain human rights norms have incontrovertibly attained customary status, including the prohibitions of genocide, slavery, racial discrimination, and torture and other cruel, inhuman or degrading treatment.[27] It is also worth noting that, as a general rule, the Commentaries refer to treaties other than the Geneva Conventions – *i.e.*, including all IHRL treaties – on the understanding that such treaties apply only to States that have ratified or acceded to them; and only if all the conditions relating to those treaties' geographic, temporal and personal scope of application are fulfilled.[28]

1) Co-application with the Fourth Convention

With respect to each IHRL treaty, it must first be determined whether it is in fact co-applicable, at least in part, with the relevant rules of the Fourth Convention. In other words, this means ascertaining whether it contains any specific rules that would exclude its application in armed conflict or otherwise regulating its relationship with the Geneva Conventions or IHL in general. Most IHRL treaties do not contain specific applicability provisions of this kind.[29] Accordingly, such treaties must be considered to remain in operation

26 R. B. Lillich, "The Growing Importance of Customary International Human Rights Law", 25(1,2) *Georgia J. Int'l & Comp. L.* 1 (1995/1996).

27 ILC, Draft Articles on State Responsibility (2001), commentary on Article 26, at para. 5 and on Article 40, at paras. 4–5; UN General Assembly, Res. 74/143, Torture and other cruel, inhuman, or degrading treatment or punishment, 18 Dec. 2019, preamble; ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, 2010, at para. 87.

28 ICRC, *Commentary on the Third Convention*, *supra* note 8, Introduction, at para. 95.

29 However, some IHRL treaties contain provisions designed to apply during armed conflicts. *See, e.g.,* Convention on the Rights of the Child, Arts. 38 & 39 (1989); Convention on the Rights of Persons with Disabilities, Art. 11 (2006). In addition, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000) is an IHRL treaty expressly adopted to address armed conflict (its purpose being, among other things, to set down certain obligations regarding assistance and reintegration).

after the outbreak of an armed conflict.[30] This has been authoritatively confirmed by the ICJ in the *Wall* Advisory Opinion, in which it held that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation".[31]

Indeed, some IHRL treaties[32] contain these last-mentioned 'provisions for derogation', also referred to as 'derogation clauses'.[33] A typical example of such a clause is found in Article 4 of the International Covenant on Civil and Political Rights (the "ICCPR"), which allows State parties to derogate from designated rules of the Covenant in time of war or other national emergency. The provision also lists those rights – such as the right to life or the right not to be tortured – from which no derogation is permitted.[34] It is important to emphasize that the inclusion of a derogation clause in a treaty confirms that the treaty continues to apply in time of armed conflict — otherwise the clause would be meaningless. As noted by the ILC, the competence to derogate in time of war "certainly provides evidence that an armed conflict as such may not result in suspension or termination" of the treaty in question.[35]

Even if a given IHRL treaty does not contain a derogation provision, its language may make it clear the treaty does not cease to apply in times of armed conflict. For example, the UN Convention against Torture provides that "[n]o exceptional circumstances whatsoever, [such as] a *state of war* … may be invoked as a justification of torture".[36] This formulation confirms that the

30 *See* Institute of International Law, *Resolution on The Effects of Armed Conflicts on Treaties*, Helsinki, 1985, Art. 4 ("The existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides.").

31 *Wall* Advisory Opinion, *supra* note 21, at para. 106.

32 *See, e.g.,* European Convention on Human Rights, Art. 15 (1950); International Covenant on Civil and Political Rights, Art. 4 (1966); American Convention on Human Rights, Art. 27 (1969); European Social Charter (Revised), Part V, Art. F (1996).

33 On derogation clauses in general, *see, e.g.,* J. F. Hartman, "Derogation from Human Rights Treaties in Public Emergencies", 22(1) *Harv. Int'l L. J.* 1 (1981). For a discussion of derogation clauses in the context of treaties on economic, social, and cultural rights, *see, e.g.,* A. Breitegger, "The legal framework applicable to insecurity and violence affecting the delivery of health care in armed conflicts and other emergencies", 95 *Int'l Rev. R. C.* 83, 98 (2013).

34 International Covenant on Civil and Political Rights, Art. 4(2) (1966).

35 ILC Draft Articles on the Effects of Armed Conflicts on Treaties (2011), at 127, para. 50.

36 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UN General Assembly Res. 39/46, 10 Dec. 1984, 1465 *UNTS* 24841, at Art. 2(2) (emphasis added). *See also* International Convention for the Protection of all Persons from Enforced Disappearance, adopted by UN General Assembly Res. 61/177, 20 Dec. 2006, Annex, 2716 *UNTS* 48088, at Art. 1(2), which uses identical language in the context of protection against enforced disappearance.

Convention is applicable in times of the listed types of exceptional circumstances, which include a state of war – in other words, a situation of armed conflict.[37]

Finally, certain IHRL treaties contain provisions explicitly regulating their relationship with IHL in general or with the Geneva Conventions in particular.[38] For instance, the 1994 Inter-American Convention on Forced Disappearance of Persons excludes its application in "the international armed conflicts governed by the 1949 Geneva Conventions and its [sic] Protocol concerning protection of … civilians in time of war".[39] As noted earlier, all provisions of the Fourth Convention except common Article 3 apply in situations qualifying as international armed conflicts.[40] Accordingly, the 1994 Convention must be seen as inapplicable to and thus of no relevance for the interpretation of Articles 1–2 and 4–159 of the Fourth Convention.[41]

Similarly, the 1979 Hostages Convention contains a clause, which specifies that that Convention does not apply to those situations that are governed by the regime for extradition and prosecution under the Geneva Conventions.[42] Accordingly, in the context of the Fourth Convention, the Hostages Convention does not apply to, and thus is not of relevance to the interpretation of, the grave breaches provisions found in Articles 146–148.[43] Conversely, the exclusion clause does not operate to exclude the relevance of the Hostages Convention for the interpretation of other provisions of the Fourth Convention, such as common Article 3[44] or Article 34 prohibiting the taking of hostages.

2) Extraterritorial application

37 *See* Committee against Torture, General Comment No. 2: Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2 (24 Jan. 2008), at para. 5.

38 *See generally* A. Clapham, "The Complex Relationship Between the Geneva Conventions and Human Rights Law", in *The 1949 Geneva Conventions: A Commentary*, 706–710 (A. Clapham, P. Gaeta & M. Sassòli eds., 2015).

39 Inter-American Convention on Forced Disappearance of Persons, Art. XV (1994).

40 *See also* ICRC, *Commentary on the Third Convention*, *supra* note 8, commentary on common Art. 2, at para. 225 (noting that common Art. 2 establishes the circumstances and conditions under which the Convention applies, with the exception of common Art. 3, which regulates non-international armed conflict).

41 *See also* Clapham, *supra* note 38, at 709.

42 International Convention against the Taking of Hostages, Art. 12 (1979).

43 Clapham, *supra* note 38, at 708.

44 *See* ICRC, *Commentary on the Third Convention*, *supra* note 8, commentary on common Art. 3, at para. 683.

To say that a given IHRL treaty is co-applicable with the Fourth Convention means that, at a minimum, the two instruments simultaneously govern the conduct of a State *in its own territory* during armed conflicts, such as when it interns enemy nationals or when it prevents them from leaving its territory.[45] However, it is more controversial whether – and to what extent – this co-applicability extends to extraterritorial conduct of the State concerned. This question arises particularly in situations of occupation, as those by definition entail the Occupying Power acting *vis-à-vis* persons who find themselves abroad, *i.e.*, in occupied territory. A large part of the Fourth Convention governs situations of belligerent occupation, which confirms the importance of this issue.[46]

Again, this question has to be resolved separately for each IHRL treaty. To begin with, certain regional human rights treaties expressly extend their applicability to everyone within their jurisdiction.[47] For the European Court of Human Rights, for instance, the relevant clause in the European Convention on Human Rights includes persons who find themselves in a territory abroad but who are considered by the Court to be under the control of the State.[48] Similarly, the Inter-American Court of Human Rights considered that the American Convention on Human Rights was applicable to extraterritorial conduct of States towards persons subject to their 'authority and control', such as during the United States' military intervention in Grenada in 1983.[49]

The relevant clause in the ICCPR is different in that it refers to "individuals within [the State's] territory *and* subject to its jurisdiction",[50] which some States have interpreted narrowly to exclude the extraterritorial application of the Covenant.[51] However, the prevailing interpretation is that the clause covers *both* individuals within a State's territory and those subject to that State's

45 On this question, *see also* sec. III.A, *infra*.

46 On this question, *see also* sec. III.B, *infra*.

47 European Convention on Human Rights, Art. 1 (1950); American Convention on Human Rights, Art. 1(1) (1969).

48 European Court of Human Rights, *Cyprus v. Turkey*, Judgment, 2001, at para. 77.

49 Inter-American Court of Human Rights, *Coard et al v. United States*, Judgment, 1999, at para. 37

50 International Covenant on Civil and Political Rights, Art. 2(1) (1966), emphasis added.

51 *See, e.g.,* United States, *Law of War Manual*, at 24, para. 1.6.3.3 (2016) ("The United States has long interpreted the ICCPR not to apply abroad"), and at 758, para. 11.1.2.6 ("the International Covenant on Civil and Political Rights (ICCPR) does not create obligations for an Occupying Power with respect to occupied territory because a contracting State's obligations under the ICCPR only extend to persons within its territory and subject to its jurisdiction").

jurisdiction wherever they may be.[52] Accordingly, State parties to the ICCPR are bound by their obligations under the Covenant with respect to anyone within those States' power or effective control, including individuals who may find themselves in a territory occupied by such States.[53]

Finally, some treaties do not contain any jurisdiction clauses or other provisions setting out their geographical scope of application. Most prominently, this is the case with the International Covenant on Economic, Social and Cultural Rights (the "ICESCR"). Nevertheless, the ICJ has held that the obligations under that Covenant apply to territories over which a State party exercises territorial jurisdiction, including situations of occupation.[54] This is also the view of the Committee on Economic, Social, and Cultural Rights (the "CESCR").[55]

In sum, as a matter of principle, most IHRL treaty rules may apply in extraterritorial settings during armed conflicts, provided that the State in question exercises its jurisdiction over individuals there. It follows, therefore, that specific IHRL rules and provisions of the Fourth Convention may in some circumstances simultaneously govern the same conduct of States involved in armed conflicts.

3) Universal and regional human rights treaties

Several human rights treaties have achieved near-universal ratification. This is the case for the two Covenants, *i.e.*, the ICCPR (173 States) and the ICESCR (171 States).[56] Some of the remaining non-ratifying States are very small States that may have been deterred by the onerous reporting obligations imposed by the Covenants, although certain other States including China, Cuba, Malaysia, Saudi Arabia, United Arab Emirates, or United States have

52 *Wall* Advisory Opinion, *supra* note 21, at para. 111; Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, at para. 10.

53 For support in academic literature, *see, e.g.,* T. Meron, *Human Rights in Internal Strife: Their International Protection*, 40 (1987); M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, 222 (2011); V. Koutroulis, "The application of international humanitarian law and international human rights law in situation of prolonged occupation: Only a matter of time?" 94 *Int'l Rev. R. C.* 165, 197 note 178 (2012); M. Sassòli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, 429 (2019).

54 *Wall* Advisory Opinion, *supra* note 21, at para. 112.

55 *See, e.g.,* CESCR, *Report on the eighteenth and nineteenth sessions*, UN Doc. E/1999/22, E/C.12/1998/26 Supp.2, 4 Dec. 1998, at paras. 232 & 234.

56 United Nations, "Status of Ratification: Interactive Dashboard", available at https://indicators.ohchr.org/

refrained from ratifying one or both Covenants for other, more substantive reasons.[57]

Furthermore, five core human rights treaties have been ratified by a comparable or higher number of States: the Convention Against Torture (173 States), the Convention on the Elimination of Racial Discrimination (182 States), the Convention on the Rights of Persons with Disabilities (184 States), the Convention on the Elimination of Discrimination against Women (189 States), and the Convention on the Rights of the Child (196 States).[58] Overall, these treaties are binding on the vast majority of States and as such they constitute an important backdrop to the framework of the interpretation of the Geneva Conventions.[59]

Regional human rights treaties – such as the European Convention on Human Rights, the American Convention on Human Rights, or the African Charter on Human and Peoples' Rights – provide for enhanced institutional arrangements with courts competent to hand down judgements binding on State parties to the respective treaties for the protection of human rights in the respective regions. In specific situations of armed conflicts taking place within those regions (and, potentially, outside of those regions but subject to the jurisdiction of the relevant State),[60] they may well offer additional protections to the affected individuals. However, due to their regional character, it is submitted that their significance for the general interpretation of universally applicable rules in the Fourth Convention is more limited.

This is not to say that no exceptions can be imagined from this general observation. These would include, for instance, situations in which a provision in a regional treaty is reflective of customary law or if it aligns with or duplicates norms that are contained in universally ratified treaties,[61] or

[57] *See* C. Tomuschat, "International Covenant on Civil and Political Rights (1966)" [version of April 2019], in *Max Planck Encyclopedia of Public International Law*, para. 11 (R. Wolfrum ed., 2019), available at http://opil.ouplaw.com/home/EPIL; B. Start, "At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement", 20 (107) *Transnat'l L. & Contemp. Probs.* 107, 130–133 (2011).

[58] United Nations, Status of Ratification, *supra* note 56.

[59] See VCLT, Art. 31(3)(c) (prescribing that in the interpretation of treaties, any relevant rules of international law applicable in the relations between the parties shall be taken into account); *see also* R. K. Gardiner, "The Vienna Convention Rules on Treaty Interpretation", in *The Oxford Guide to Treaties*, 506 (D. B. Hollis ed., 2012) (arguing that the drafting history of Art. 31(3)(c) suggests that the 'relevant rules' are not restricted to customary rules but also include treaty rules).

[60] *See* sec. II.B.2, *supra* (discussing the extraterritorial application of IHRL treaties).

[61] *See, e.g.,* ICRC, *Commentary on the Third Convention*, *supra* note 8, commentary on common Art. 3, at para. 624, referring to the various provisions in the universal and regional treaties that require respect for the right to life.

expressly applies in armed conflict,[62] or where decisions of regional courts illustrate useful approaches to resolving possible norm conflicts between IHL and IHRL (for example, by interpreting their treaty in light of specific IHL rules or in the specific factual circumstances of armed conflict).[63]

However, overall, the approach of the Commentaries is to refer to regional IHRL treaties sparingly, and if such references are made, these are included in order to direct practitioners to additional sources that may be relevant in their operational context rather than to suggest generally applicable interpretations of IHL rules.[64]

C. The lex specialis principle provides an established method of resolving conflict between the Fourth Convention and IHRL, but it must be applied on a rule-by-rule basis

The notion of *lex specialis* has become a staple of discussions about the relationship between IHL and IHL. However, it is not always used to denote the same idea.[65] In particular, it is sometimes said that IHL is 'the *lex specialis*', with the implication that, as a body of law designed for the regulation of armed conflicts, during armed conflicts IHL will always prevail over other branches of international law. This regime-wide approach to *lex specialis* appears in official statements of some States, including the United

62 *See, e.g.,* American Convention on Human Rights, Art. 9 (1969) (expressly addressing women affected by armed conflict, thus adding normative clarification for States Parties to the obligation in Art. 27 of the Fourth Convention on protecting women from sexual violence); African Charter on the Rights and Welfare of the Child, Art. 22 (1990) (raising the age of child recruitment for State Parties to age 18 from age 15 required by Art. 77(2) of Additional Protocol I).

63 *See, e.g., Hassan v. United Kingdom*, [GC], no. 29750/09, ECHR, 2014 (Judgment).

64 *See* ICRC, *Commentary on the Third Convention*, *supra* note 8, Introduction, at para. 102.

65 On the different conceptions of *lex specialis*, *see, e.g.,* M. Milanovic, "The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law" in *Theoretical Boundaries of Armed Conflict and Human Rights*, 103–114 (Jens D. Ohlin ed., 2016).

States,[66] Israel,[67] or Russia,[68] and – although without further elaboration or justification – even in certain outputs of the ILC.[69] Such approaches may appear appealing as they seem to offer easy answers to complex questions of interpretation of rules found in different legal regimes. IHL would serve, in effect, as an interpretive trump card, overriding other potentially conflicting norms from other branches of international law.

However, it is submitted that the regime-wide approach stretches the notion of *lex specialis* far beyond its established role as a "maxim of legal interpretation and technique for the resolution of normative conflicts".[70] The *lex specialis* principle refers to the identification of a *norm* of a special character in relation to *another norm* of a general character, with a view to ensuring the application of the more appropriate norm in a given situation.[71] In other words, a rule can never be 'general' or 'special' in the abstract, but always only in relation to some other rule.[72] Accordingly, this assessment has

66 United States, Observations of the United States of America on the Human Rights Committee's Draft General Comment No. 36 on Article 6 – Right to Life, 2017, at para. 17 ("Although the United States would agree as a general matter that armed conflict does not suspend or terminate a State's obligations under the Covenant within its scope of application, we do not believe that the Committee's views, reflected here or in prior general comments addressing military operations, accord sufficient weight to the well-established principle that international humanitarian law (IHL) is the lex specialis with respect to the conduct of hostilities and the protection of war victims (e.g., prisoners of war, civilian internees, persons placed hors de combat) in any armed conflict").

67 Israel, Second Periodic Report to the Human Rights Committee, UN Doc. CCPR/C/ISR/2001/2, 20 Nov. 2001, at para. 8 ("[I]n Israel's view, the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights").

68 Russian Federation, Preliminary comments on Draft General Comment No. 36 on Art. 6 (right to life) of the International Covenant on Civil and Political Rights, 2017, at para. 39 ("[I]t is internationally recognized that in the context of an armed conflict, the norms of international humanitarian law prevail over all other branches of international law").

69 *See, e.g.,* ILC, Draft Articles on the Effects of Armed Conflicts on Treaties (2011), commentary on Art. 2, at para. 4 ("the rules of international humanitarian law … constitute the *lex specialis* governing the conduct of hostilities"); ILC, Draft Principles on Protection of the Environment in relation to Armed Conflicts (2019), commentary on draft principle 13, at para. 5 ("the law of armed conflict is *lex specialis* during times of armed conflict").

70 *See* ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* para. 56 (2006) (with references).

71 *See, e.g.,* M. Sassòli & L. Olson, "The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts", 90(871) *Int'l Rev. R. C.* 599, 603 (2008); Breitegger, *supra* note 33, at 90; G. Oberleitner*, Human Rights in Armed Conflict: Law, Practice, Policy* 87 (2015).

72 ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* para. 112 (2006).

to be done on a rule-by-rule basis; as noted by Lindroos, "an abstract determination of an entire *area of law* as being more specific towards another area of law is not, in effect, realistic".[73] After all, the content of many IHRL norms is quite specific and some of them are more specific than the corresponding IHL norms.[74] For example, while IHL rules refer to judicial guarantees, IHRL provides much more detail on what those guarantees entail.[75] Similarly, in the occupation context, the work of the IHRL treaty bodies may provide an understanding of specific welfare needs of the occupied population and of the relevant obligations that is more detailed than the applicable IHL provisions.[76]

Therefore, it is preferable to avoid taking the regime-wide approach to *lex specialis* in the interpretation of the Geneva Conventions. Instead, the application of the *lex specialis* principle should be done on a rule-by-rule basis when, after having analysed the said rules' material, personal, temporal, and geographic scope of application, an otherwise unresolvable conflict of norms is evident.[77] In such circumstances, the literature offers a number of criteria to determine the specialty of one rule of the other, including: whether the rules regulate the issue at hand explicitly or implicitly; whether the rules are formulated in a detailed or general manner; whether the regulation is restrictive or less exacting; and whether the solution specifically addresses practical challenges posed by armed conflict.[78]

The final criterion is particularly important given that the Convention's rules were designed to apply in situations of armed conflict and that any

73 A. Lindroos, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*", 74(1) *Nordic Journal of International Law* 27, 44 (2005) (emphasis added); *see also* Duffy, *supra* note 22, at 76 ("IHL cannot be seen as monolithically constituting *lex specialis*, just as normative conflict can arise only on the level of particular norms not of legal regimes as a whole").

74 *See, e.g.,* Duffy, *supra* note 22, at 73 ("IHRL will more often provide the meat on the comparable, but skeletal, framework of IHL provisions; examples may include the meaning of humane treatment, fair trial standards affording 'essential judicial guarantees', the definition of slavery, protection of family life or health") (footnotes omitted). The degree of detail in the formulation of a rule is only one factor in the determination of its specialty vis-à-vis other co-applicable rules; as discussed later in this section, a key precondition for the reliance on the *lex specialis* principle is that an otherwise unresolvable conflict of norms is evident between the rules in question.

75 *See, e.g.,* Oberleitner, *supra* note 71, at 102; Sassòli, *supra* note 53, at 216; L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, 123 (2011).

76 N. Lubell, "Challenges in applying human rights law to armed conflict", 87(860) *Int'l Rev. R. C.* 737, 751 (2005). *See also* sec. III.B, *infra*.

77 *See also* ICRC, *Commentary on the Third Convention*, *supra* note 8, Introduction, at paras. 103–104.

78 *See* Sassòli, *supra* note 53, at 439–440; *see also* references in notes 70–77, *supra*.

interpretation of the Convention must be realistic and capable of application in the contexts in which the Conventions are to operate. Accordingly, in the vast majority of cases arising during armed conflicts, IHL rules can be expected to be the more specific norms in relation to IHRL rules of parallel applicability.

III. RELIANCE ON HUMAN RIGHTS LAW IN THE PARTICULAR CONTEXTS IN WHICH THE FOURTH CONVENTION OPERATES

The Fourth Convention contains a wide range of provisions that cover vastly diverging sets of circumstances. What they all share is a firm commitment to the respect for the human person in the midst of war. However, the precise scope of application, detail of regulation, and degree of restrictiveness differ from provision to provision. It is thus probably impossible to identify an overarching approach to the use of IHRL in the context of the Fourth Convention as a whole.

Instead, this section proposes a set of considerations organized by the three key contexts in which the Convention is to operate: (i) in the own territory of a State party to an international armed conflict; (ii) in a foreign territory occupied by such a State; and (iii) in situations of detention. The structure of this section thus mirrors the Convention, although it is acknowledged that with respect to norms that apply across different types of situations and territories there may be broader commonalities to the interpretive approach.

A. IHRL complements the protection of civilians who find themselves in the territory of a State involved in an international armed conflict

Certain provisions of the Fourth Convention regulate the relationship between a State that is a party to an armed conflict and protected persons, typically individuals of enemy nationality, who find themselves in the territory of that State, but whose liberty has not (or not yet) been restricted. This is the case especially with regard to provisions in sections I and II of Part III of the Convention. Of those, section II focuses specifically on the treatment of protected persons residing in the territory of belligerent States.

Although Pictet's 1958 Commentary described the safeguards in that section as 'comprehensive',[79] to a modern observer they may actually appear to be

[79] ICRC, *Commentary on the Fourth Geneva Convention* 233 (Pictet ed., 1958) ("the provisions in this Section … give protected persons a legal status in the form of a comprehensive series of safeguards set out in detail") (footnote omitted).

'rather bare'.[80] This is because they cover only the most rudimentary issues such as the right to leave,[81] humane treatment for persons in confinement,[82] the minimum standard of treatment for protected persons,[83] provisions on means of existence and employment,[84] assigned residence and internment,[85] treatment of refugees,[86] and transfers to a third State.[87]

However, this section of the Convention also contains an important *renvoi* in Article 38, which provides that "[w]ith the exception of special measures authorised by the present Convention … the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace". Crucially, the broad formulation 'provisions concerning aliens in time of peace' does not exclude any area of international or domestic law; the only condition is that the rules in question must be applicable to foreign nationals in peacetime. Accordingly, it can be interpreted as confirming that, subject to any 'special measures authorised by' the Convention, the applicable rules of IHRL remain in force for the persons protected under the Fourth Convention (recognizing that those rules themselves may allow for derogation, limitation or particular interpretation and application, in situations of armed conflict).[88]

This reinforces the need to consider any relevant and potentially co-applicable provisions of IHRL in the interpretation of the articles found in the said section of the Convention. For example, the Convention establishes a legal framework concerning the right to leave for civilians in enemy territory in Articles 35–37, while for State parties to the ICCPR, the right to leave is addressed in different terms under Article 12 of the ICCPR.[89]

80 N. Nishat, "The Structure of Geneva Convention IV and the Resulting Gaps in that Convention", in *The 1949 Geneva Conventions: A Commentary* 1074 para. 14 (A. Clapham, P. Gaeta & M. Sassòli eds., 2015).

81 Fourth Convention, *supra* note 4, at Art. 35.

82 *Id*., at Art. 37.

83 *Id*., at Art. 38.

84 *Id*., at Arts. 39–40.

85 *Id*., at Arts. 41–42.

86 *Id.*, at Art. 44.

87 *Id.*, at Art. 45.

88 *See, e.g.,* H. Obregón Gieseken, "The protection of migrants under international humanitarian law", 99(904) *Int'l Rev. R. C.* 121, 133 (2017) ("This includes domestic law as well as IHRL and international refugee law, as applicable"). *See also Commentary on the Fourth Geneva Convention*, *supra* note 79, at 244–249.

89 Compare Article 35 of the Fourth Convention, which allows for refusal of permission to leave the territory if an individual's departure would be against the State's 'national interests', with Article 12(3) of the ICCPR, which refers in relevant part to 'national security' and 'public order'.

Finally, it is worth noting that IHRL also affords protections to persons who do not qualify as protected persons under IHL and who are thus outside of the scope of this section of the Convention.[90] This is because IHRL rules apply in principle to all persons under a State's jurisdiction, without distinction as to their nationality.[91] Accordingly, to build on the example used in the previous paragraph, in principle the right to leave under Article 12 of the ICCPR applies to all persons in the territory of a party to an international armed conflict that has ratified the ICCPR, irrespective of the status of such persons under the Geneva Conventions, albeit subject to any derogation or limitations in the context of the armed conflict.[92]

B. IHRL contributes to the normative clarification of rules of the Fourth Convention applicable in situations of belligerent occupation

Certain provisions of the Fourth Convention govern the relationship between an Occupying Power and protected persons in the occupied territory whose liberty has not (or not yet) been restricted.[93] This is the case especially with respect to provisions in sections I and III of Part III of the Convention.

Today, IHRL is widely recognized as applicable in situations of occupation.[94] The applicable IHRL obligations include all customary human

90 *See* Fourth Convention, *supra* note 4, at Art. 4.

91 *See, e.g.,* Convention on the Elimination of Racial Discrimination, Art. 1(1) (1965); International Covenant on Civil and Political Rights, Art. 2(1) (1966); International Covenant on Economic, Social and Cultural Rights, Arts. 2(2) & 3 (1966); Convention on the Elimination of Discrimination against Women, Art. 1 (1979); Convention on the Rights of the Child, Art. 2(1) (1989); European Convention on Human Rights, Art. 14 (1950); American Convention on Human Rights, Art. 1(1) (1969); African Charter on Human and Peoples' Rights, Art. 2 (1981); and Arab Charter on Human Rights, Art. 2 (2004).

92 *See* UN Human Rights Committee, *General Comment No. 27, Article 12 (Freedom of Movement)*, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 Nov. 1999, at para. 18 ("it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

93 Provisions governing the detention of protected persons, including in the occupied territory, are discussed in sec. III.C, *infra*.

94 T. Ferraro, "The Law of Occupation and Human Rights Law: Some Selected Issues", in *Research Handbook on Human Rights and Humanitarian Law*, 273 (R. Kolb & G. Gaggioli eds., 2013) (noting that IHRL "has been, over time, widely recognized as applicable in situations of occupation"); ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, 61 (2012) (noting that "[a]lmost without exception, the experts asserted that the applicability of human rights law to situations covered by IHL, in particular military occupation, should be widely recognized"); *but see* M. J. Dennis, "Application of Human

rights obligations and those treaty-based IHRL obligations that are binding either on the Occupying Power directly, based on its own treaty ratifications,[95] or – arguably – on the State that is occupied.[96]

This means in particular that IHRL sets forth obligations that Occupying Powers are bound to respect vis-à-vis the local population.[97] Undoubtedly, actions of the occupier must today be examined not only through the lens of IHL but also through that of IHRL.[98] Accordingly, the key question is no longer whether IHRL applies or not in occupied territory but rather to identify how, and to what extent, this body of law applies in such circumstances.[99]

Nevertheless, there are important differences between the two branches. It is sometimes said that the law of occupation was designed to articulate the obligations of a belligerent for the welfare of the population of the enemy, while IHRL is seen as mainly imposing obligations on the State with regard to the welfare of its own population.[100] Relatedly, the law of occupation is at times described as protecting the reversionary interest of the displaced

Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", 99 *Am. J. Int'l L.* 119 (2005).

95 *See also* sec. II.B.2, *supra* (discussing the extraterritorial application of IHRL treaties).

96 N. Lubell, "Human Rights Obligations in Military Occupation", 94(885) *Int'l Rev. R. C.* 317, 334–336 (2012); G. Giacca, *Economic, Social, and Cultural Rights in Armed Conflict*, 215–216 (2014); *see also* UN Human Rights Committee, *General Comment No. 26, Continuity of Obligations*, UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 Dec. 1997, at para. 4 ("once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them"); ILC, Draft Principles on Protection of the Environment in relation to Armed Conflicts (2019), commentary on principle 20, para. 9, *Report of the International Law Commission on the work of its seventy-first session*, UN Doc. A/74/10, 273–274 (2019) (considering that the Occupying Power must respect the international obligations of the occupied State); European Parliament, Directorate-General for External Policies, "The situation of national minorities in Crimea following its annexation by Russia", April 2016, at 31 ("Russia as the occupying power has to comply with its own human rights obligations in occupied Crimea and with the human rights obligations of the occupied territory – that is, binding commitments taken by the lawful sovereign Ukraine"); United States, *Law of War Manual*, 759, at para. 11.1.2.6 (2016) ("an occupied State's domestic law that has been enacted pursuant to its human rights treaty obligations or that meets the requirements of the occupied State's human rights treaty obligations may continue to apply during an occupation").

97 P. Spoerri, "The Law of Occupation", in *The Oxford Handbook of International Law in Armed Conflict* 196 (A. Clapham & P. Gaeta eds., 2014).

98 *Id.* at 199.

99 ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, 63–64 (2012); *see also* Spoerri, *supra* note 97, at 199.

100 Ferraro, *supra* note 94, at 291 note 13.

government,[101] which is an aim entirely absent from IHRL. Moreover, the law of occupation is based on an assumption that the period during which the Occupying Power will exercise authority and control over the population is temporary, whereas IHRL assumes the territorial State will exercise authority on an indefinite basis.[102] And while the Fourth Convention explicitly contemplates that the Occupying Power will share governmental authority to some extent with the pre-existing State institutions in the occupied territory,[103] IHRL treaties were generally not specifically drafted with concurrent jurisdiction in mind, instead implicitly reflecting, initially at least, an assumption that a single State has exclusive authority over the population in any given territory (an assumption which has nevertheless been eroded over time).[104]

In general terms, the fact of applicability of IHRL during occupation does not automatically provide the Occupying Power with the legal power to legislate in the field of human rights in the occupied territory. In accordance with Article 43 of the Hague Regulations, the Occupying Power is under a general obligation to restore and ensure public order and civil life in the occupied territory as far as possible, while respecting, unless absolutely prevented, the laws in force in the country. Article 64 of the Fourth Convention, in turn, defines when the Occupying Power may depart from these laws in force. Specifically, any legislative initiatives of the Occupying Power must be necessary for (i) the fulfilment of its obligations under the Fourth Convention, (ii) maintenance of the orderly government in the occupied territory, or (iii) ensuring the security of the Occupying Power.[105]

[101] *See, e.g.,* Y. Z. Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria", 3(2) *Isr. L. Rev.* 279, 293 (April 1968) (arguing that the law of occupation aims "to safeguard the reversionary rights of the ousted sovereign"); *but see* Letter by Herbert J. Hansell, Legal Adviser of the US Department of State, 21 April 1978 (1978) *Digest of US Practice Intl. L*., 1578 ("Protecting the reversionary interest of an ousted sovereign is not [the law of occupation's] sole or essential purpose; the paramount purposes are protecting the civilian population of an occupied territory and reserving permanent territorial changes, if any, until the settlement of the conflict"); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 95 (noting that the drafters of the Fourth Convention were concerned less with the protection of the rights of the occupied State and more with the protection of civilians in time of war).

[102] N. Lubell, "Human Rights Obligations in Military Occupation", 94 *Int'l Rev. R. C.* 317, 333 (2012).

[103] *See, e.g.,* Fourth Convention, *supra* note 4, at Arts. 50(1) & 56(1), referring to the co-operation between the Occupying Power and the national/local authorities.

[104] *See, e.g.,* S. Besson, "Concurrent Responsibilities under the European Convention on Human Rights", in *The European Convention on Human Rights and General International Law*, 163 (A. van Aaken & I. Motoc eds., 2018); M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 43–45 (2nd edn. 2005).

[105] Fourth Convention, *supra* note 4, at Art. 64(2).

Giving effect to IHRL in occupied territory may be justified especially on the first two of these grounds.[106]

For example, the Occupying Power would be entitled to repeal local laws providing for racial discrimination, not only to give effect to the customary prohibition of racial discrimination under IHRL,[107] but also to fulfil the Occupying Power's obligations under Article 27(3) of the Fourth Convention, which prescribes that all protected persons are to receive the same standard of treatment, without any discrimination based on prohibited criteria including, 'in particular', race, religion, or political opinion.[108]

Arguably, the same would apply to adopting legislative measures prohibiting all discrimination against women, as required by IHRL.[109] Even though Article 27(3) does not expressly mention 'sex' or 'gender' among the prohibited grounds for discrimination, the phrase 'in particular' confirms that the list is not exhaustive, and the ensuing development of customary law makes it clear that adverse distinction in the application of IHL based on sex is now prohibited, too.[110]

Overall, it is important to carefully balance the competing considerations underpinning IHRL and occupation law, respectively, as noted by Spoerri:

106 Y. Arai-Takahashi, "Law-Making and the Judicial Guarantees in Occupied Territories", in *The 1949 Geneva Conventions: A Commentary*, 1426–1427, para. 15 (A. Clapham, P. Gaeta & M. Sassòli eds., 2015). *See also* ICJ, *Armed Activities* case, *supra* note 21, at para. 178 (holding that the obligation under Article 43 of the Hague Regulations comprises the duty to secure respect for the applicable rules of IHRL).

107 *See supra* note 27.

108 *See Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, at 833 (summarizing the view of the Third Committee that laws that "constitute an obstacle to the application of the Convention' would include those that 'provid[e] for racial discrimination'"). For an argument that the Occupying Power would not only be entitled to repeal such laws, but also obliged to do so, *see, e.g.,* Y. Dinstein, *The International Law of Belligerent Occupation,* at 123–126 (2nd edn., 2019) (inferring this duty from the obligation to respect and ensure respect for the Convention stipulated in Common Article 1 read together with the proscription to invoke the provisions of internal law as justification for the failure to perform a treaty found in Art. 27 of the VCLT).

109 Convention on the Elimination of Discrimination against Women, Art. 2(b) (1979); *see also* Committee on the Elimination of Discrimination against Women, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. CEDAW/C/GC/28, 16 December 2010, paras. 10–11 & 32.

110 ICRC Study on Customary International Humanitarian Law (2005), Rule 88. *See also* ICRC, *Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law*, 25 (2022).

> the implementation of human rights in occupied territory might amount to an agenda for societal reforms, which could be at odds with the conservationist principle underlying the law of occupation and could go beyond what the Occupying Power is permitted to do under occupation law. A means of delimiting such legislative ambitions would be that the resulting changes must pass the test that they are absolutely necessary under the Occupying Power's human rights obligations and must stay as close as possible to local standards as well as to local cultural, legal, institutional, and economic traditions.[111]

A key method of diffusing the normative tension that underpins this balancing process is through the participation of the local population in the Occupying Power's decision-making process.[112] As noted by the ICRC, "the occupying power would not be failing to respect protected persons' manners and customs, and would not be transforming the territory for a purpose driven by its own preferences, if its actions reflected the views of [the local population]".[113] This way, the tension between IHRL and occupation law can be addressed in a way that effectively protects the local population.

In accordance with the co-application approach discussed earlier, IHRL also broadens and enriches the rules of IHL applicable to occupation. In particular, it deepens this legal framework when its content is sufficiently detailed to concretize specific provisions of the law of occupation.[114] In that regard, the Fourth Convention imposes specific obligations on the Occupying Power that relate to the administration of occupied territories. A significant number of them concern various welfare-related matters, including health, food, humanitarian relief, work and employment, as well as education and cultural issues.[115] Accordingly, the role of IHRL is principally to inform the content of the relevant IHL rules in the sense of providing what has been described as a 'normative clarification', in the sense of giving specific meaning to the rather

[111] Spoerri, *supra* note 97, at 196 (emphasis added). *See also id*. at 185–186, listing four general principles of the law of occupation, which 'ought always to be borne in mind' when considering issues arising from occupation and which therefore complement the conservationist principle.

[112] ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, 75–76 (2012).

[113] ICRC, *Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law*, 30 (2022)

[114] ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, 95 (2012).

[115] Many of these rules entail positive obligations of means, which take effect subject to considerations such as the level of control exerted by the Occupying Power or the resources available to it. *See* ICRC, *Commentary on the Third Convention*, *supra* note 8, commentary on common Art. 2, at para. 356.

more abstract terms found in the IHL rules.[116] This need to apply IHRL becomes only more acute with passing time and especially so in situations of prolonged occupation that may span years or even decades.[117]

For example, the obligation to ensure and maintain public health and hygiene under Article 56(1) is phrased in fairly general terms. The provision obliges the Occupying Power to ensure and maintain "the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics". As noted by Giacca, the content of all those measures may be found in the complementary application of the right to health under IHRL, as that right is defined under the ICESCR and further interpreted by the CESCR.[118] Under this approach, the Occupying Power would be obliged to ensure that the measures it takes respect the four criteria of availability, accessibility, acceptability, and quality identified by the CESCR.[119] Accordingly — and although this is not expressly mentioned in the Fourth Convention — the Occupying Power would be precluded from providing, for example, scientifically unapproved or expired drugs to the protected persons.[120]

Finally, it should be noted that IHRL may again offer additional protections to those individuals who do not qualify as protected persons under IHL but nevertheless find themselves in the occupied territory. This is the case with the nationals of the Occupying Power who due to their nationality do not

116 G. Giacca, "Economic, Social and Cultural Rights in Occupied Territories", in *The 1949 Geneva Conventions: A Commentary* 1489 (A. Clapham, P. Gaeta & M. Sassòli eds., 2015); *see also* Ferraro, *supra* note 94, at 279 (suggesting that IHRL "could play an important role in substantiating the meaning of the concept of the welfare of the population");

117 A. Roberts, "Prolonged military occupation: The Israeli-occupied territories since 1967", 84(1) *Am. J. Int'l L.* 44, 71 (1990); N. Lubell, "Challenges in applying human rights law to armed conflict", 87(860) *Int'l Rev. R. C.* 737, 752 (2005); Koutroulis, *supra* note 53, at 197.

118 Giacca, *supra* note 116, at 1496, para. 37; *see also* Breitegger, *supra* note 33, at 95 (arguing that the right to health as interpreted by the CESCR may be of particular significance in prolonged calm occupations where control of the Occupying Power over the occupied territory has been stabilised); Diakonia, "COVID-19 Vaccines for the Palestinian Population: Who is Responsible under International Law?", 5 (2021) (arguing that the authorities that have control over the occupied Palestinian territories must abide by the applicable IHRL standards in distributing COVID-19 vaccines to all Palestinians on a non-discriminatory basis).

119 UN Economic and Social Council, *General Comment No. 14, The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4, 11 August 2000, para. 12.

120 *Id.,* at para. 12(d).

normally benefit from a protected status under the Fourth Convention.[121] Accordingly, in a string of cases the Supreme Court of Israel held that Israeli nationals present in the Occupied Palestinian Territories, including settlers, benefit from fundamental human rights such as the right to life[122] and freedom of religion.[123] It should be noted, however, that this line of case-law has been subject to criticism in the literature for weakening the legal protection afforded to protected persons under international law.[124] It is thus essential to ensure that the recognition of IHRL protections to nationals of the Occupying Power present in the occupied territory does not undermine the status of protected persons as defined under the Fourth Convention.

C. In detention, IHRL clarifies the legal protection available to protected persons under the Fourth Convention

Finally, certain provisions of the Fourth Convention regulate the relationship between one of the parties to the conflict and protected persons whose liberty has been restricted by that party to the conflict (usually thus referred to as the Detaining Power). The vast majority of these provisions are located in sections I and IV of Part III of the Convention. They apply to the persons benefiting from the protections afforded by the Convention, irrespective of which territory they are in.

Certain aspects of detention of protected persons in armed conflict, as regulated under the Fourth Convention and other applicable norms of IHL, are significantly different from detention of individuals in ordinary peacetime conditions. This must be taken into account in interpreting IHRL rules applicable to detained persons.

In particular, the Fourth Convention provides for the internment of protected persons for security reasons.[125] While preventive detention is not unique to armed conflict, IHRL and IHL diverge significantly on the regulation of the lawful grounds for this measure. The Human Rights Committee is of the view

[121] *See* Fourth Convention, supra note 4, at Art. 4(1) ("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").

[122] *See, e.g.,* Israel, Supreme Court sitting as High Court of Justice, *Nasser v. The Prime Minister*, Judgment, 2007.

[123] *See, e.g.,* Israel, Supreme Court sitting as High Court of Justice, *Rachel's Tomb case*, Judgment, 2005, paras. 12–15.

[124] *See, e.g.,* D. Kretzmer, "The law of belligerent occupation in the Supreme Court of Israel", 94(885) *Int'l Rev. R. C.* 207, 222; A. Gross, *The Writing on the Wall: Rethinking the International Law of Occupation*, 376–377 (2017).

[125] Fourth Convention, *supra* note 4, at Arts. 42 & 78.

that in peacetime, "[s]uch detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available".[126] This is not so pursuant to IHL, where the context is distinguishable from peacetime and where the power to intern is expressly provided for and available to parties to the conflict.[127]

Even in cases such as this, recourse to IHRL is necessary. With regard to internment, the ICRC has taken the view that:

> The rights of persons interned for security reasons in armed conflict — whether international or non-international — may be said to fall into the category of rights that, in the ICJ's wording, are "matters" of both branches of law. Given the aforesaid absence of rules for the internment of individuals in non-international armed conflicts, it is necessary to draw on human rights law in devising a list of procedural principles and safeguards to govern internment in such conflicts. To a large extent the same may be said with regard to any effort to clarify the rights, and therefore the legal protection, that should be accorded to persons covered by the Fourth Geneva Convention or Additional Protocol I in international armed conflicts.[128]

By way of an example, with respect to civilians in pre-trial detention or those serving a criminal sentence, the Fourth Convention contains only a general rule for their humane treatment.[129] In such situations, it is thus appropriate to look to IHRL for further detail regarding what constitutes humane treatment.

To give another example, one may consider the right to challenge the decision of internment or placing in assigned residence provided by Article 43

126 UN Human Rights Committee, *General Comment No. 35, Article 9: Liberty and Security of person*, UN Doc. CCPR/C/GC/35, 16 Dec. 2014, at para. 15.

127 *See id.,* at para. 64 (recognizing that "[s]ecurity detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary").

128 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2007, Annex 1 ("Procedural Principles and Safeguards for Internment / Administrative Detention in Armed Conflict and Other Situations of Violence"), at 377–378.

129 Fourth Convention, *supra* note 4, at Art. 76; *see also id*. at Art. 126 (extending the application of Article 76 from the occupied territory also to the national territory of the Detaining Power).

of the Fourth Convention.[130] The same provision expressly permits the review decision to be made by either a 'court or administrative board'.[131] By contrast, the corresponding IHRL provisions call for judicial (*i.e.*, not administrative) review.[132] This presents the question how to resolve the normative tension between these two sets of rules in the context of international armed conflicts.

The relevant rules of IHL were specifically designed for the circumstances of armed conflict and they are more specific than IHRL in that they afford a right to appeal and to subsequent periodic review.[133] In accordance with the criteria for the application of the principle of *lex specialis* outlined earlier,[134] it would thus appear that a quasi-judicial body such as an administrative board providing safeguards of impartiality and fair procedure is sufficient for the purposes of reviewing the legality of internment and placing in assigned residence during international armed conflicts.[135] This interpretation also appears to be accepted by certain regional human rights bodies,[136] while the position of the Human Rights Committee remains somewhat opaque.[137]

130 *See also* Fourth Convention, *supra* note 4, at Art. 78 for the corresponding procedure applicable in the occupied territory.

131 Fourth Convention, *supra* note 4, at Art. 43. Although Article 78 speaks instead of a 'competent body' set up by the Occupying Power, it is generally accepted that this phrase is to be read as similarly referring to either a court or an administrative board. *See, e.g., Commentary on the Fourth Geneva Convention*, *supra* note 79, at 368–369; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2007, Annex 1 ("Procedural Principles and Safeguards for Internment / Administrative Detention in Armed Conflict and Other Situations of Violence"), 386; L. M. Olson, "Admissibility of and Procedures for Internment", in *The 1949 Geneva Conventions: A Commentary*, 1337, para. 38 (A. Clapham, P. Gaeta & M. Sassòli eds., 2015); Sassòli, *supra* note 53, at 300.

132 International Covenant on Civil and Political Rights, Art. 9(4) (1966); *see also* European Convention on Human Rights, Art. 5(4) (1950); American Convention on Human Rights, Art. 7(6) (1969).

133 Olson, *supra* note 129, at 1338, para. 41.

134 *See* sec. II.C, *supra*.

135 Olson, supra note 129, at 1338–1339; D. Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* 194 (2016); Sassòli, *supra* note 53, at 301.

136 *See* Inter-American Commission on Human Rights, *Case 10.951 (Coard et al v. United States)*, Report, 1999, para. 58; European Court of Human Rights, *Hassan v. United Kingdom*, Judgment, 2014, para. 106. *But see* Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, para. 146 (2002).

137 *See* N. Rodley & M. Pollard, *The Treatment of Prisoners under International Law*, 491 (3rd edn. 2009), observing that the position adopted by the Human Rights Committee in its General Comment no. 29 implied that "parties to the Covenant, at least, may be required to opt for an 'appropriate court' rather than an 'administrative board' for these purposes". In its more recent General Comment no. 35 on the right to liberty, the Committee added on the one hand that "[s]ecurity detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary"; on the other hand, it reaffirmed

CONCLUSION

This article has examined the role of IHRL in the interpretation of the Fourth Geneva Convention. At their core, both sets of rules are dedicated to protecting the inherent dignity of the human person.[138] What is more, the adoption of the Fourth Convention in 1949 as well as the ongoing development of IHRL since the end of the Second World War both reflect the growing humanization of international law.[139] In many ways, therefore, the said rules pull in the same direction and they reinforce each other in situations of parallel application.

Against that background, this article has argued that the Fourth Geneva Convention, as an international treaty, must be interpreted in light of the entire framework of applicable international law, which includes IHRL. Reliance on the prescriptions of IHRL treaties, however, is contingent on their scope of application and ratification status. To the extent that this co-application reveals conflict between rules from the two regimes, this must be resolved by recourse to established principles of conflict resolution, including the principle of *lex specialis*, by which a more specific legal norm takes precedence over a more general one (see section II).

Building on these general considerations, the article has then argued that the role of IHRL in the interpretation of the Fourth Convention differs based on the specific context governed by that Convention. It probably carries the

its relevant pronouncements from General Comment no. 29, including that "States parties derogating from normal procedures required under article 9 in circumstances of armed conflict or other public emergency must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation" and that "the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation". *See* Human Rights Committee, *General Comment No. 35 – Article 9: Liberty and Security of person*, UN Doc. CCPR/C/GC/35, 16 Dec. 2014, paras. 64, 65, & 67, respectively.

138 *See, e.g.,* Universal Declaration of Human Rights, preamble (1948); International Covenant on Civil and Political Rights, preamble (1966); International Covenant on Economic, Social and Cultural Rights, preamble (1966), which all contain identical language recognizing "the *inherent dignity* and … the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world" (emphasis added); ICRC, *Commentary on the Third Convention*, *supra* note 8, Introduction, at para. 19, noting that "[t]he basic principle underlying all four [Geneva] Conventions is respect for the life and *dignity of the individual*, even – or especially – in situations of armed conflict" (emphasis added); see also ICTY, *Prosecutor v. Furundžija*, no. IT-95-17/1-T, Trial Chamber II, Judgment, 10 Dec. 1998, para. 183 ("The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law").

139 *See generally* T. Meron, *The Humanization of International Law* (2006).

greatest weight in a State's own territory, as confirmed by the renvoi to all 'provisions concerning aliens in time of peace' found in Article 38 of the Convention. However, IHRL also provides important normative clarification and additional protection in situations of belligerent occupation and in detention contexts, as discussed in greater detail earlier (see section III).

Overall, the analysis in this article reflects but a small part of the interpretive process that is undertaken in updating the Commentaries on the four Geneva Conventions. Individual rules often present specific challenges, which necessitate more nuanced or differentiated approaches. In addition, other applicable rules – such as those belonging to the 1977 Additional Protocols or to other non-IHL bodies of law including the law of State responsibility, international criminal law, or refugee law – may further influence the interpretation of the Conventions.[140]

Nonetheless, it is hoped that the present article provides a useful contribution to the general debates about the methodology of treaty interpretation. IHRL and the Conventions will continue to co-exist and co-apply in the future. Building a coherent, rigorous, and workable approach to the interpretation of the Conventions in light of IHRL is thus an essential aspect of ensuring effective protection of individuals in modern armed conflicts.

[140] *See* ICRC, *Commentary on the Third Convention*, *supra* note 8, Introduction, at paras. 92–116.