LIVING IN DENIAL:
THE APPLICATION OF HUMAN RIGHTS IN THE OCCUPIED TERRITORIES

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Only the dead have seen the end of war
Plato

Abstract

Are human rights norms applicable to occupied territories in general, and to the West Bank and the Gaza Strip in particular? The article examines the controversy that had arisen between Israel and the UN treaty monitoring bodies in relation to this question and critically analyzes Israel’s three objections to such applicability: 1) the mutual exclusivity of humanitarian regime and human rights regime in occupied territories, the former being thus the only applicable law; 2) a restrictive interpretation of the jurisdictional provisions treaties; and 3) the lack of effective control in some of the territories. The article posits that the universal object and purpose of human rights treaties, which inform the proper interpretation of their jurisdictional clauses, require their applicability in all territories subject to the effective control of the state parties, as well as to other extra-territorial exercises of government power.

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directly affecting individuals. Consequently, international human rights law and international humanitarian law apply in occupied territories in parallel and not to the exclusion of one another. This position is confirmed by extensive practice of the international human rights monitoring bodies, the International Court of Justice (ICJ), and by some decisions of the Israeli Supreme Court. In conclusion, the paper posits that Israel's refusal to apply the six principal human rights treaties to which it is party to the Occupied Territories is incompatible with its international law obligations and proceeds to propose modalities for the co-application of both human rights and humanitarian law in occupied territories.

I. Introduction

Are human rights norms applicable to occupied territories in general, and to the West Bank and the Gaza Strip in particular? This is the question explored in this paper. The Israeli government and international human rights bodies have taken antithetical positions on this matter. Thus, in its Second Periodic Report submitted to the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) a committee entrusted with monitoring implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR)\(^1\) – the State of Israel has included the following statement:

“In its concluding observations on Israel's initial report, the Committee questioned Israel's position regarding the applicability of the Covenant to the West Bank and the Gaza Strip. Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction. This position is based on the well-established distinction between human rights and humanitarian law under international law. Accordingly, in

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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. Furthermore, pursuant to the Israeli-Palestinian Interim Agreement of 1995, and the consequent documentation and undertakings of the Palestine Liberation Organization, the overwhelming majority of powers and responsibilities in all civil spheres (including economic, social and cultural), as well as a variety of security issues, have been transferred to the Palestinian Council, which in any event is directly responsible and accountable vis-à-vis the entire Palestinian population of the West Bank and the Gaza Strip with regard to such issues. In light of this changing reality, and the jurisdiction of the Palestinian Council in these areas, Israel cannot be internationally responsible for ensuring the rights under the Covenant in these areas. The fact that the Palestinian Council does not represent a State, does not, in itself, preclude its responsibility in the sphere of human rights protection... In this respect, it should be noted that without prejudice to its basic position, Israel has been willing – and, in fact, has done so in the context of its oral presentation of its initial periodic report – to cooperate with the Committee and provide relevant information to the extent possible, with regard to the exercise of those powers and responsibilities, which according to the agreements reached with the Palestinians, continue to be exercised by Israel in the West Bank and the Gaza Strip.”

Israel has reiterated exactly the same position, bringing forth these very same arguments in almost identical language, in its Second Periodic

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Report to the Human Rights Committee (HRC), with regard to the applicability of the International Covenant on Civil and Political Rights (ICCPR) in the Occupied Territories.

In its concluding observations, issued in May 2003, the ESCR Committee stated:

"The Committee also reiterates its concern about the State party's position that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction, and that the Covenant is not applicable to populations other than the Israelis in the occupied territories. The Committee further reiterates its regret at the State party's refusal to report on the occupied territories... In addition, the Committee is deeply concerned at the insistence of the State party that, given the circumstances in the occupied territories, the law of armed conflict and humanitarian law are considered as the only mode whereby protection may be ensured for all involved, and that this matter is considered to fall outside the sphere of the Committee's responsibility."

Similarly, the HRC held in August 2003 that:

"The Committee reiterates the view... that the applicability
of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation. Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in Occupied Territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by its authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of state responsibility of Israel under the principles of public international law.6

Other UN human rights treaty bodies have equally found the Israeli position to be untenable for these very same reasons.7


Ultimately, the view that the Convention requires such reporting prevailed in the
The above articulated positions of the Israeli government on the one hand, and of human rights bodies on the other hand, are diametrically opposed. The examination of the validity of these respective positions pertaining to the applicability of human rights instruments to areas beyond the recognized national borders of a State party lies at the core of this paper. Specifically, we are interested in examining the application of human rights standards, deriving from both treaty and customary law, in the West Bank and the Gaza Strip.

The issue of the applicability of human rights standards in occupied territories is one of fundamental theoretical and practical importance. From a jurisprudential perspective, it goes to the very essence of the principle of the universality of human rights and involves the delicate, yet fascinating problem of coordinating between overlapping international regimes – in this case, international human rights (IHR) law and international humanitarian law (IHL). From a practical perspective, it may well generate a redefinition of the precise scope of an occupying power’s human rights obligations under international law, serving as a yardstick for measuring the lawfulness of a variety of concrete measures which affect human well being. While the effect of introducing IHR law in situations of occupation is mitigated by the more specific provisions of IHL, it still serves several important functions: it affects the interpretation of IHL norms, it fills normative gaps in the scope of protection afforded by IHL and it validates the legitimacy of the involvement of international supervisory mechanisms in situations of occupation.

The particular complexities relating to the status of the West Bank and Gaza Strip provide a most interesting case study of the question of

Committee. See CERD Concluding Observation (1994), supra; CERD Concluding Observation (1998), supra. The only UN Treaty body before which the issue never explicitly arose is the Committee Against Torture. While Israel expressed the view that there were legal difficulties in applying the Convention in the Occupied Territories, it never formally challenged the authority of the Committee to receive information with relation to events taking place in the West Bank and Gaza Strip. Committee Against Torture Summary Record of the Public Part of the 184th meeting: Israel, 28 April 1994, para. 22 UN Doc. CAT/C/SR.184 (1994)/“In the light of the details [the] delegation had already provided to the Committee, the question [of applicability] must be regarded as a purely formal one... although there were legal arguments in favour of not implementing the Convention in the Territories.”)
the applicability of human rights in occupied territories. Since 1967, these areas have been governed by Israel under the laws of belligerent occupation. The Oslo process has led, in the mid 1990s, to the creation of the Palestinian Authority (PA) and to the delegation of authorities from Israel to it with respect to certain areas of the West Bank and the Gaza Strip. Following the collapse of the peace process in the year 2000, Israel has re-occupied some areas in these territories, and has left the PA largely incapacitated to exercise governmental powers even in areas nominally subject to its control. Israel has been further engaged in various activities in these areas, including closures, assigned residence, targeted killings etc., which entail severe humanitarian implications.

These political twists and turns raise, inter alia, difficult questions pertaining to the human rights responsibilities of occupying states; the transferability of human rights obligations; the conditions under which non-state actors, such as autonomous territories, could assume human rights responsibilities; the conditions absolving a former occupying power from shouldering human rights responsibilities; and the extra-territorial applicability of human rights treaties in areas falling outside the occupier’s control. In practical terms, the dire humanitarian situation in the Occupied Territories has created an overwhelming impetus for determining the precise range of the applicable legal obligations of the concerned parties (Israel and the PA). Clarifying the law could perhaps encourage legal entities, such as the Israeli Supreme Court, to take a more active approach towards protecting human rights in the Occupied Territories (utilizing existing doctrines for the incorporation of international law in domestic law), advancing the welfare of the people as well as a legal culture of compliance, not evasion. In the same vein, the legitimacy of the involvement of IHR supervisory mechanisms would be enhanced. This, in turn, could contribute to a greater degree of compliance by Israel with its international obligations and an improvement in the humanitarian conditions on the ground.

Note, however, that Israel contests the formal applicability of the Fourth Geneva Convention in the Occupied Territories. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, art. 27, 75 U.N.T.S. 287 (Hereinafter: Geneva IV). For a discussion see infra text accompanying n. 17.
We believe that the doctrinal position that IHR law is not applicable to occupied territories is untenable. Rather, both IHR law and IHL regimes apply, in a manner which, while taking legitimate military considerations into account, is informed by the principle of the universality of human rights and provides a safety net designed to ensure that no person shall find herself in a legal vacuum bereft of protection. We further submit that it is the very interaction between IHL and IHR law which determines the precise scope of the legal obligations the Belligerent Occupant has to shoulder vis-à-vis the population and the corresponding scope of the protection the latter enjoy, in any concrete situation.

Although this article discusses at length the positions of Israel, the view that IHR law does not apply in occupied territories is shared by a few other States, most notably the U.S. (at least insofar as it exercises its control over Guantanamo Bay). Our focus on Israel rests not only on our personal convictions regarding the need to promote Israeli compliance with international law, but also on the striking features of the protracted situation in the West Bank and Gaza (e.g., prolonged occupation and a humanitarian crisis), which we believe underscore our arguments. It should, nevertheless, be recognized that the Israeli position is not monolithic, and that, as we will argue below, the Israeli Supreme Court has taken a more nuanced position towards the applicability of IHR in the Occupied Territories. In other words, there might be some gap between domestic judicial practice and the political rhetoric on the international plane. However, for methodological reasons we will concentrate on the sweeping argument against applicability made by representatives of the Israeli government before international institutions. Our references throughout the paper to the Israeli position should be contextualized accordingly.

In order to substantiate our argument, section II proceeds to detail the position of the Israeli government with regards to the inapplicability of human rights law in the Occupied Territories, expounding on both its legal and policy underpinnings. This position rests on three main grounds: the mutual exclusivity of both regimes; the narrow construction of the jurisdictional clauses of the major human rights treaties; and, the lack of effective Israeli control over the territories pursuant to the Oslo Accords. Section III advances a critique of the Israeli official position, addressing
each of its arguments in a manner substantiated by theory, policy, legal analysis and international jurisprudence, including that of relevant treaty bodies, as well as of the Israeli Supreme Court. Section IV offers concluding observations regarding the interplay between IHR law and IHL and presents a broad yet flexible approach to the question of the applicability of human rights law in occupied territories in a manner that takes into consideration the legitimate concerns of an Occupying Power without sacrificing the principle of legality on the altar of political expediency.

II. The Israeli Position: Human Rights Treaties are Inapplicable to the Occupied Territories

A. General

In 1991, in a move little-noticed within Israel and without significant public discussion, Israel ratified five UN human rights treaties – the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC). This brought the number of UN-sponsored human rights treaties to which Israel is party to six, as it had ratified in 1979 another treaty – the International Convention for the Elimination of All Forms of Racial Discrimination (CERD).

Although it is a party to the leading human rights treaties, consecutive Israeli governments have steadfastly objected to their application in the Occupied Territories. Israel’s position regarding the applicability of the treaties comprises three arguments:13 (a) The mutual exclusivity argument, according to which the simultaneous application of IHR law and IHL is a contradiction in terms, and the applicability of the latter in the Occupied Territories excludes the applicability of the former; (b) The treaty interpretation argument, according to which the jurisdictional clauses of the human rights treaties to which Israel is a party should be construed as limited to the sovereign territory of the State parties; and, (c) The effective control argument, according to which, the creation of the PA, and the transfer of governmental authorities thereto under the Oslo accords, absolves the State of Israel from any responsibilities it might have had for the human rights of Palestinians living in areas subject to the control of the PA.14 The combined thrust of all three arguments, detailed in the following subsections, is that Israel cannot be held accountable for the human rights situation in the West Bank and the Gaza Strip. In the context of Israel’s relations with the UN treaty bodies, this means that Israel is under no obligation to report upon the implementation of human rights treaties to which it is party in the Occupied Territories.15


15 It should be noted that the same position had been essentially taken by Israel during the 1990s, with regard to the application of the Conventions to Southern Lebanon. Israel had argued that the Conventions could not apply there by reason of their language
B. The Mutual Exclusivity Argument

The first argument advanced by Israel pertains to the overlap between two potentially applicable international regimes: IHR law and IHL. Israel argues, in essence, that the application of the latter precludes the application of the former.

There is little doubt that the conduct of an occupying force in occupied territories is subject to the rules of belligerent occupation, which had been developed under IHL, long before the advent of international human rights law. This body of rules is detailed in two principal instruments – the 1907 Hague Regulations and the Fourth Geneva Convention of 1949. Israel's traditional position has been to recognize the application of the Hague Regulations in the West Bank and the Gaza Strip. Although Israel is not a party to the 1907 Fourth Hague Convention, to which the Regulations are appended, it accepts the customary international law status of the latter. With regards to the application of the Fourth Geneva Convention in the West Bank and the Gaza Strip Israel has taken a more nuanced position. While rejecting the formal application of the Convention on the grounds that the territories were never placed under the sovereignty of another High Contracting Party, as is arguably required by article 2 of the Convention, Israel, which had ratified the Convention in 1951, has undertaken to apply its humanitarian provisions in the Territories.

and in the light of absence of effective control over that area by Israel. Since this legal question has become moot following the Israeli withdrawal from Southern Lebanon in 2000, we will not address it in the context of the present article, although our conclusions with regard to the applicability of the Conventions to the Occupied Territories are relevant for that discussion as well.


Since the laws of belligerent occupation apply in the Occupied Territories, Israel submits that it would be inappropriate to also apply international human rights law. Arguably, “the [human rights treaties] and the Geneva Conventions gave different answers to the same questions, and it was therefore not possible to apply the provisions of both instruments.” Furthermore, one ought to accord preference to the humanitarian law regime, as it was intended to “balance the needs of humanity against the nature of warfare”, whereas human rights law was “developed in the context of a normal relationship between State, Government, citizens and internal population.” Given the great divide between peace and war, and given further the nature of occupation, the legal situation in occupied territories is arrested by the framework of IHL, a regime developed specifically to address the unique problems of governing occupied territories.

Analytically, the position of Israel, that the concurrent application of IHL and of IHR law is, in essence, a contradiction in terms, may be substantiated on the following, inter-related grounds:


20 Ibid., at para. 22.
(1) Theoretical substantiation: IHR law is the law of peace. It is truly *jus contra bellum*,\textsuperscript{21} developed pursuant to the outlawing of war in the United Nations Charter. IHL, by contrast, presupposes the resurrection of the very situation the Charter had purported to relegate to the dustbin of history.\textsuperscript{22} The connection between the development of human rights and the transition from a belligerent to a peaceful global existence is evident in the Preamble to the Universal Declaration of Human Rights (UDHR).\textsuperscript{23} Arguably, the two regimes, signifying the law of war and the law of peace, govern not only different, but mutually exclusive, situations.\textsuperscript{24} Indeed, this fundamental distinction was recognized in the International Conference on Human Rights in Teheran, when it acknowledged that "[P]eace is the underlying condition for the full observance of human rights and war is their negation".\textsuperscript{25}

(2) Historical substantiation: IHL and IHR law have distinct historical origins, the former donning the mantle of pedigree, being one of the oldest branches of international law and deriving from the medieval culture of chivalry;\textsuperscript{26} the latter, being a relative newcomer, essentially a post World War II development, and inspired by post-Enlightenment domestic domestic
These distinct historical roots are relevant as they are indicative of the *raison d'être* of each regime and of their respective scopes of applicability: IHL is essentially an inter-state law forever cognizant of military considerations. It regards the individual as an object, focusing on how a party to a conflict behaves towards protected persons. IHR law, by contrast, is informed by the *erga omnes* principle, and has as its subject the individual as a legal persona endowed with inalienable rights.

(3) Institutional substantiation: The separate spheres of existence of IHL and IHR law are further evidenced by the different institutions responsible for ensuring compliance with their respective obligations: the International Committee of the Red Cross (ICRC) is the "incorruptible guardian" of humanitarian law whereas the United Nations (UN) and other international human rights bodies are concerned with IHR law. This institutional division is grounded not merely in the different telos and history of each regime, but is further reflective of a cultural gap between them: the ICRC is a non-political organization which has shied away from the politics of the UN; the latter, a clearly political body, having outlawed war in its Charter, has proceeded to distance itself from the laws of war. Indeed, expediency considerations counsel against politicizing the international response to war-related humanitarian crises through subjecting it to the political supervision of UN bodies, as such development might hamper the willingness of States to cooperate with...


30 Baxter, *supra* n. 22, at p. 103.

31 This point is substantiated further by Colb's study of the preparatory works of both the Universal Declaration of Human Rights and the Geneva Conventions, as well as of the Commentaries on the Geneva Conventions published under the editorship of Jean Pictet between 1952–1960, disclosing the paucity of cross referring one regime to the other. See Colb, *supra* n. 21, at p. 413–414.
the ICRC and other impartial humanitarian agencies. These distinct institutional umbrellas arguably lend support to the Israeli argument that neither the HRC nor the other UN treaty bodies have a mandate to relate to events in the Occupied Territories.

(4) Practical substantiation: the above-mentioned institutional substantiation is related to other arguments that lend support to the practicality of separating the law of war from the law of peace: IHL, precisely because it has been formulated with military considerations in mind, is likely to be complied with, thereby ensuring a more effective protection of human rights in times of war than that offered by the derogable and rather vague human rights norms. This reasoning seems to suggest, then, that those who maintain that IHL and IHR law are, and should remain, distinct, are actually motivated by humanitarian concerns.

(5) Legal substantiation: The above distinct theoretical, historical and institutional contexts find expression in the normative regimes at issue: IHL focuses on how a party to a conflict is to behave and is therefore formulated as a series of duties imposed on the combatants, whereas IHR law focuses on its subjects, on the recipients of a certain treatment, and is therefore formulated as a series of rights. This distinction accounts for the different formulation of the respective norms: IHL texts are more detailed and complex than IHR's. Further, the distinction so fundamental to IHR law, between civil and political rights and socio-economic and cultural rights, (and more recently the “third generation” of rights) –

32 See Pictet, supra n. 21, at 15; Cohen, supra n. 17, at 9.
34 In the same, somewhat ironic vein, it may be, indeed it has been, argued that the very idea of making humanitarian law more humane, by infusing it with human rights’ consciousness, is counterproductive, as the harsher the law, the shorter the war. This argument is presented, and refuted, in Meron, supra n. 26, at 240–242.
36 On the distinction between first and second generation rights, see e.g., Asbjorn Eide and Allan Rosas, “Economic, Social and Cultural Rights: A Universal Challenge” in
the former requiring immediate compliance, and the latter being more tentative – is foreign to IHL. In addition, there are important distinctions pertaining to the application *ratione personae* and *ratione materiae* of IHR and IHL instruments: the Geneva Conventions make applicability conditional on nationality or other status which renders an individual a “protected person”, whereas no such restrictions exist with respect to IHR law. Indeed, “human rights law is designed to operate primarily in normal peacetime conditions and within the framework of the legal relationship between a state and its citizens. International humanitarian law, by contrast, is chiefly concerned with the abnormal conditions of armed conflict and the relationship between a state and the citizens of its adversary, a relationship otherwise based upon power rather than law.”

The applicability of the Geneva Conventions is further determined by the nature of the conflict, that is, whether it is classified as an international or as a non-international armed conflict; and, lastly, humanitarian norms, precisely because they have been formulated to govern situations of armed conflicts, and unlike human rights norms, are not subject to derogation.


37 See Doswald-Beck and Vite, supra n. 28, at 101.
38 See e.g., Geneva IV, art. 4–5. See also Pictet, supra n. 21, at 15.
41 The narrow exception being Geneva IV, art. 5. On derogation from human rights obligations during an armed conflict, see Dinstein, supra n. 24, at 351–354; Dinstein, supra n. 33; Bertrand G. Rachman, “The Role of International Bodies in the
The "Mutual Exclusivity" argument thus proposes that IHL is an alternative regime to IHR law, designed specifically to apply to armed conflicts situations and, therefore, better suited to meet humanitarian concerns. Put differently, the Israeli position maintains that the concurrent application of the two regimes is irreconcilable and that, consequently, one regime should apply. That regime must be the relevant lex specialis – i.e., the law most suitable – in terms of its purpose, form and substance – to govern the situation. That law is IHL. This essentially doctrinal position is supplemented by a legalistic argument, grounded in the language of the six global human rights treaties to which Israel is party, and discussed in the following subsection.

C. The Treaty Interpretation Argument

The crux of the "treaty interpretation argument" is that the jurisdictional clauses of the six human rights conventions should be narrowly construed so as to cover only persons present within the sovereign territory of State parties or within other areas governed by their laws. This position arguably conforms to the principle laid out in article 29 of the Vienna Convention that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect to its entire territory". As a result, human rights treaties, which do not have any jurisdictional clause – the ICESCR and CEDAW, should be construed as having only a territorial applicability – i.e., over persons situated within Israel's territory.

In the same vein, the specific jurisdictional clauses found in the other treaties – "[e]ach State party... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" (article 2(1) of the ICCPR; emphasis added); "States Parties... undertake to prevent, prohibit and eradicate all [racist practices] in territories under their jurisdiction" (article 3 of


CERD; emphasis added); “Each State Party shall take effective... measures to prevent acts of torture in any territory under its jurisdiction” (article 2(1) of CAT; emphasis added);[43] and “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction” (article 2(1) of CRC; emphasis added) – should be interpreted in light of the aforementioned jurisdictional principle, which, when coupled with the above-discussed ‘mutual exclusivity’ argument, generates the inapplicability of the treaties to the Occupied Territories.[44] Specifically, Israel argues that the term ‘jurisdiction’ should be narrowly construed so to encompass only areas falling within the sphere of application of national sovereignty governed by domestic laws.[45]

With respect to the ICCPR, the application of which to the Occupied Territories would entail considerable consequences for Israel, it could also be maintained that a literal reading of the text of article 2(1) supports the view that the two conditions specified in it – territorially and jurisdiction – are cumulative and must both be met for the ICCPR to apply.[46] This conjunctive approach ensures that the Covenant would only apply in circumstances in which the contracting State is materially capable and legally entitled to implement the rights specified in the Convention. This position enjoys the support of a number of writers,[47] and is buttressed, to a considerable degree, by the practice of States involved in extra-territorial military operations.[48]

43 See also CAT, art. 16.
44 See e.g., Committee on the Elimination of Racial Discrimination Summary Record of the 1250th meeting: Israel, 9 March 1998, para. 4, UN Doc.CERD/C/SR.1250 (1998).
45 See infra text accompanying n. 167–169.
46 Cf. MWC, art. 7 (“States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention...”) (emphasis added). This demonstrates that the drafters of the ICCPR could have resorted to clear disjunctive language had they intended to reject a conjunctive reading of the Covenant.
Israel's position on the proper method of interpreting the human rights treaties could be justified on the following historical, theoretical and practical grounds, which, arguably, typify international human rights. Historically, the inapplicability of human rights treaties to persons situated outside the territory of a State party conforms to the process of development of international human rights as a body of norms primarily designed to govern the relations between a State and its own citizens.\(^49\)

As is well known, the human rights movement grew out of the catastrophic experience of World War II in response to the appalling failure of States – primarily Nazi Germany – to respect the basic rights of their own citizens.\(^50\) As a secondary aim, the movement sought to protect the rights of stateless persons and refugees.\(^51\) However, there is no indication that the movement ever intended to protect individuals, situated in their own national territory, from foreign States. With regard to such individuals it


could be assumed that their State of nationality could protect their interests in peacetime through diplomatic channels and that IHL would be able to protect their interest during wartime.

Israel’s position can further be strengthened from a theoretical perspective: the international human rights system was created in the context of intra-societal relations – i.e., relations between governments and individuals, which correspond to the existing State system. This configuration of human rights and State obligations is founded upon the political theory that governments derive their legitimacy from their duty to uphold human rights and the consent of the governed. It embraces a particular vision of the ‘social contract’. Citizens undertake to accept governmental authority, with the ensuing range of limitations and duties, in exchange for the government’s obligation to protect their fundamental human rights and provide their basic needs. This idea, echoed in article 29(1) of the UDHR, implies some degree of reciprocity between human duties and human rights. This notion could, to some degree, justify the


53 See e.g., Declaration of Independence of the Thirteen Colonies, 4 July 1776 (“That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”).


55 Article 29 reads: “Everyone has duties to the community in which alone the free and full development of his personality is possible.”

granting of human rights to non-citizens present within the territory of a State, as during their presence there they must respect local conventions. Expanding human rights to encompass relations falling outside this political model, however, lacks comparable justification. Even the most abstract notions of reciprocity cannot explain interaction between a government and individuals belonging to a foreign society, who interact with it in an incidental and haphazard manner. In fact, in cases of occupation, the inherent hostility between the occupier and the occupied undercuts the transferability of IHR from the intra-societal to the extra-societal sphere. 57

Finally, on a practical level, it should be noted that the extra-territorial application of human rights conventions would obligate a State to protect the rights of a large number of persons situated outside its territory. States are ill situated to shoulder such obligations. They have little information on the identity of foreign individuals, their needs and their motives. Further, the ability of governments to control areas situated outside their sovereign territory is generally limited, when compared to their ability to control their own land. This is especially the case when extra-territoriality is associated with war and other emergency conditions. Insisting upon the application of the human rights conventions in such circumstances would place a burden far too high for most States to meet. 58

It should be noted in this context that while, prima facie, the scope of the treaty interpretation argument is rather narrow as it only addresses the interpretation of several specific treaties and does not purport to limit the applicability of customary international human rights law or the applicability of other relevant treaties, which affect the living conditions of people in occupied territories, appearances are notoriously deceptive: the treaty interpretation argument is inseparable from the doctrinal position rejecting the applicability of human rights in occupied territories, as advanced in the ‘mutual exclusivity’ argument. There should, indeed,

57 Meyrowitz, supra n. 47, at 1098–1099; Dinstein, supra n. 17, at 116; Dinstein, supra n. 24, at 355.
be a link between treaty interpretation and general international law doctrines, as is confirmed, inter alia, by article 31(3) (c) of the Vienna Convention on the Law of Treaties (normally viewed as reflective of customary law) which provides that treaty interpretation should be taken with a view to "any relevant rules of international law applicable in the relations between the parties". Consequently, the interpretation of the six treaties is clearly affected by the general stand taken with respect to the very application of human rights law.

D. The "Effective Control" Argument

A final argument advanced by Israel goes to the definition of occupation, in the context of delimiting the scope of the human rights obligations that might ensue. According to this line of argument, even if one accepts the notion that international human rights treaties apply in occupied territories, most of the people of the West Bank and the Gaza Strip would not benefit from the protection thereby afforded, as they are no longer subject to Israel's effective control.

This argument rests on the proposition that international law recognizes only actual exercise of authorities and responsibilities as indicative of effective control. Hence, the delegation of authorities and responsibilities to the PA under the Oslo Accords exempts Israel from assuming obligations with respect to persons subject to the rule of the PA. An important element of the argument, emphasized by Israel, is that the Oslo Accords specifically prescribe that the parties exercise their respective authorities


62 See ICESCR Second Periodic Report, supra n. 2, at para. 7; ICCPR Second Periodic
“with due regard to internationally accepted norms and principles of human rights and the rule of law”. This would, arguably, prevent the transformation of the Occupied Territories into ‘human rights-free zones’, since the PA could, and indeed should, be required to uphold human rights standards.

Israel has supplemented this argument by claiming that it would be impossible for it, on a practical level, to report to the UN treaty bodies on subject matters or areas which have been transferred to the PA. This is so because it simply does not have the information on issues such as freedom of religion in Bethlehem or infant-mortality rates in Gaza hospitals. On a pragmatic level, however, Israel has often agreed to provide accessible information to the UN treaty bodies, without prejudice to its objections to the applicability of the Conventions in the Occupied Territories.

Support for this position may be found in the European Court of Human Rights (ECHR) decision in the Bankovic case, where the Court implied that the threshold for what constitutes ‘effective control’ over a territory is rather high and that it is linked to the capacity to ensure the entire scope of rights provided in the European Convention on Human Rights. The Court further suggested that the term ‘jurisdiction’ should be construed in the light of the traditional limitations introduced by international law on the permissibility of extra-territorial exercises of authority. Applying such legal standards to the West Bank and the Gaza

Report, supra n. 3, at para. 8; HRC Summary Record, supra n. 19, at para. 26; CERD Summary Record, supra n. 44, at para. 6.


64 HRC Summary Record, supra n. 19, at para. 22; CESCR Summary Record, supra n. 14, at para. 38. See also CERD Summary Record, supra n. 44, at para. 5 (“Israel, not only legally but for very practical reasons, was not in a position to report on cases of discrimination in the territories. It was not in a position to enforce any compliance with human rights norms in the territories and was therefore unable to brief the Committee on the situation”).

65 See e.g., HRC Summary Record, supra n. 19, at para. 27.

66 Bankovic, supra n. 48. For a detailed discussion of the case see infra text accompanying n. 219–231.

67 Ibid., at para. 75.

68 Ibid., at para. 59–61.
Strip could relieve Israel of the duty to implement human rights conventions in areas over which it no longer exercises legal authority to act. It would also exempt isolated uses of force by the Israel Defense Forces (IDF) in PA controlled areas – such as targeted killing operations – from the purview of the conventions, and make their legality or lack thereof subject exclusively to the application of IHL norms.

Having thus detailed the various grounds on which the Israeli position rests, the following section proceeds to subject them to critical review and analysis.

III. A Critique of the Israeli Position

A. General

“The first line of defense against international humanitarian law”, as keenly observed by Baxter, “is to deny that it applies at all”.69 Ironically, Israel, as was discussed above, has applied that line of defense to deny, or at least curtail, not merely the application of IHL, but also that of international human rights law, to the territories it has occupied since 1967. This section offers a critique of this position, addressing each of its substantiating arguments. The combined thrust of the detailed discussion below points to the indefensibility of the Israeli stand: human rights law is applicable to territories subject to belligerent occupation. This is a fortiori the case in instances of a prolonged occupation, where IHR law together with IHL, forms the legal framework within which Israel has to operate in the areas over which it exercises effective control in the West Bank and the Gaza Strip.

69 Richard Baxter, “Some Existing Problems in Humanitarian Law” in The Concept of International Armed Conflict: Future Outlook (Brussels, 1974) 1, at 2. [see details in http://lms01.harvard.edu/F/5VUE1GBMSSHLE83SAHNE11VUP4X4VUXKEG59 VNT2T1RM3TSAK-01151?func=full-set-set&set_number=100983&set_entry=000032& format=999 – the original paper was from 1974, it was reprinted in 1975]
B. The Twain Have Met: the Co-Application of IHL and IHR Law

The Israeli 'mutual exclusivity' argument, proposing that IHL is an alternative regime to IHR law, presents a doctrinal position, grounded in the traditional distinction between war and peace. This theoretical division, however, is becoming ever harder to sustain in the face of a humbling awareness of the indeterminacy of either war or peace and of the dynamic symbiosis that characterizes their relationship. In the DNA of the human condition, war and peace are the twining strands of the helix. It is this awareness which led the framers of the United Nations Charter, reflecting back on the horrors of the Second World War, to premise it on the nexus between the “scourge of war” and the denial of human rights; it is this nexus that has become the one constant in the ever changing, at times virtual, face of war over the past few decades with its ensuing blurring of long-established distinctions. It is this awareness that has led to the development of a new theoretical paradigm, merging the hitherto supposedly distinct regimes of the law of peace and the law of war.

The new paradigm, driven by human rights' consciousness, does not posit the law of war, appropriately referred to as ‘international humanitarian law’, as an alternative to the law of peace, but as an

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70 See supra Part II (B).
71 Charter of the United Nations, 26 June 1945, preamble, 59 Stat. 1031 (Hereinafter: UN Charter) (“We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person”).
72 See for example, the considerable convergence of IHL norms governing international and non-international armed conflicts; Prosecutor v. Tadic, Decision of 2 Oct. 1995, para. 97–127 (ICTY Appeals Chamber) [http://www.un.org/icty/tadic/appeal/decision-e/51002.htm].
73 Pictet, supra n. 21, at 11–18. It is interesting to note in this context that pursuant to the HCJ’s ruling of April 18, 2002, in H.C.J. 769/02, The Public Committee Against Torture v. Government of Israel (The legality of targeted killings case), which requested the parties, inter alia, to state their positions on what system of law applies to the issue, the Respondent's brief (Supplementary Statement by the State’s Attorney’s Office), argued not only that IHR law is inapplicable but that the Respondent will use the term “Law of Armed Conflicts” rather than “International Humanitarian Law”: “Without going into
exception to the full application of the latter. The human rights regime has thus become the normal order of things. Humanitarian law does not function outside that order but as part thereof, derogating from its full application to the extent required by the exceptionality of any concrete situation. It is human dignity, then – and the desire to protect it – that provides both the *raison d'être* and the teleological common denominator of IHL and IHR law alike, and it is the principle of universality of human rights, recognized in the UDHR, which underscores the need to extend fundamental human rights protections to all individuals under all circumstances.

The 1968 Teheran International Conference on Human Rights, far from supporting the Israeli position regarding the great divide between the law of war and the law of peace, in fact called on Israel specifically, in a resolution entitled ‘Respect and Enforcement of Human Rights in the Occupied Territories’, to apply both the Geneva Conventions and the Universal Declaration of Human Rights to the territories it had occupied since 1967. Indeed, the Teheran Conference is considered to have laid

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74 Draper, *supra* n. 24, at 197.
75 For a clear articulation of this paradigm, see Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, art. 15, 213 U.N.T.S. 222 (Hereinafter European HR Convention); American Convention on Human Rights, art. 27, 27 Nov. 1969, 1144 U.N.T.S. 123 (Hereinafter: IA HR Convention).
77 UDHR, art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind...”)(emphasis added). The second sentence of article 2 is particularly relevant to the case in discussion – “… [N]o distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”.
78 See *supra* text accompanying n. 21–25.
79 Resolution I (Respect and Enforcement of Human Rights in the Occupied Territories),
the cornerstone for the building of the new paradigm: its general resolution XXIII, entitled ‘Respect for Human Rights in Armed Conflicts’, was reaffirmed by the General Assembly in Resolution 2444 (1968) which called on the Secretary-General to report on measures needed to be taken to increase the protection to all individuals in armed conflicts. In the Secretary-General’s subsequent reports, and in the resolutions of the General Assembly which adopted and reiterated these reports, it has been made clear that the international community finds no merits in the traditional distinction between human rights and humanitarian law, and considers that both apply in situations of armed conflict in general, and of belligerent occupation, in particular.

The Teheran Conference thus acted as a catalyst for the ever-wider acceptance of the notion that IHR law does not cease to apply in situations of armed conflict, but it did not invent it: the principle of humanity, underlying IHR law, was never absent from IHL, as typified by the Martens Clause. Indeed, IHL’s hallmark is the balance it has always
attempted to strike between military considerations on the one hand, and humanitarian concerns, on the other hand. Thus, while there is no denying the distinct historical roots of these two regimes, it is equally difficult to refute that the seed that would eventually father the law of human rights was already planted in IHL. Indeed, it has been the depth of human suffering and the denial of the human person, wrought by war, which has, over time, shifted the balance between the competing factors comprising IHL — military necessity and humanitarian concerns — rendering the latter set of considerations weightier. It is this humanizing trend that explains the recognition of crimes against humanity and of genocide — crimes, which by definition imply an equal recognition of a subject who is a bearer of human rights as well as of duties — as crimes under international law by the Nuremberg Tribunal and by the Genocide Convention. It is this trend which explains the substitution of common Article 1 of the Geneva Conventions — held by the ICJ to be customary and thus analogous to the IHR's *erga omnes* principle — for the *si omnes* clause, as well as for the near elimination of the legality of reprisals, thus attesting to the shift in the centre of gravity from an inter-state to


85 See Charter of the International Military Tribunal (IMT), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 Aug. 1945, 82 U.N.T.S. 280:


87 The article reads: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".


89 Hague IV, art. 2; Convention for the Amelioration of the Condition of the Wounded and the Sick in Armies in the Field, 6 July 1906, art. 24, 11 L.N.T.S. 440.

90 The 1929 Prisoners of War Convention prohibited Reprisals against POWs, 27 July, 1929, 118 L.N.T.S. 343; the 1949 Geneva Conventions prohibited Reprisals against
an individual perspective. It is this trend that has reached its logical conclusion, the confluence of IHL and IHR law, in Teheran. Later developments, including the 1977 Protocols Additional to the Geneva Conventions references made to humanitarian law in human rights conventions; the 1990 Declaration of Minimum Humanitarian Standards, and recent developments in criminal international law, culminating in the Statute of the International Criminal Court, which

protected persons, installations and property and outlawed collective punishment (Geneva I, art. 45; Geneva II, art. 47; Geneva III, art. 13; Geneva IV, art. 33). This prohibition was expanded in Protocol I, art. 20, 51–56. Finally, a general prohibition against reprisals affecting humanitarian interests can be derived from article 60(5) of the Vienna Convention. Insofar as the very notion of reprisals is anathema to the notion of individual protection underlying IHR law, this transition gives evidence to the distance IHL has made from its original inter-state focus.

For a discussion on the various manifestations of this shift, see generally, Meron, supra n. 26, at 247–251.

The Protocols reflect, inter alia, the influence of IHR by either making explicit references to certain rights (see e.g., Protocol I, art. 72; Protocol II, preamble), or by taking human rights into consideration (see e.g., Protocol I, art. 1(4) – referring to the right of self-determination; Protocol I, art. 75(4) – borrowing some of the language of ICCPR, art. 14). See generally, Dietrich Schindler, “Human Rights and Humanitarian Law” (1982) 31 A. U. L. Rev. 935; Dinstein, supra n. 24; Provost, supra n. 35, at 6.


Article 7 of the ICC statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9 (1998)(Hereinafter ICC Statute) defines crimes against humanity. The concepts underlying these crimes derive from human rights law (e.g., the right to life, not to be tortured, the right to liberty and to security of person), as distinct from war crimes in the Statute, deriving from IHL. Note that as crimes against humanity may be committed in times of peace as well as in times of armed conflict, it further stands to reason that they can be committed against both civilians and members of the military. See e.g., Prosecutor v. Tadic, judgment of 7 May 1997, para. 643 (ICTY Trial Chamber) [http://www.un.org/icty/tadic/trialc2/judgement/tad-tj970507e.htm]. Article 6 of the ICC Statute, reproducing article II of the Genocide Convention, defines the crime of genocide, which could be viewed as a distinct subcategory of crimes against humanity.
proscribes crimes against humanity and genocide in both peace and war
time situations, confirmed and reinforced the validity of the new paradigm.

Indeed, the argument that since historically IHL operated between
states with persons being merely its object, it must always remain so
seems to defy both the nature of history and the purpose of a legal regime:
history tells the story of change over time. The change most relevant for
the purposes of this discussion is from inter-state to intra-state or mixed
conflicts not of an international character *stricto senso*. This, indeed, is
the nature of the Israeli-Palestinian conflict.96 It is this change that has
drawn IHL ever closer to IHR law. To maintain that IHL does not apply
because it was designed originally to cover a different historical
configuration, and that IHR law does not apply because we are not dealing
with a peaceful situation, is to suggest a legal vacuum where power reigns
free. This stand may well epitomize *raison d'état*, but it clearly defies the
*raison d'être* of a legal regime.

96 Common Article 2 of the Geneva Conventions defines a conflict as international when it
is waged between two or more states. According to common Article 3, all other conflicts
are ened non-international. Article 1(4) of Additional Protocol I, in an effort to adapt
the rules to changing realities, broadened the definition of an international armed conflict
thereby equating the status of – and thus the protection accorded to – national liberation
movements with that of states. This move had the then Palestinian Liberation
Organization in mind, which is precisely why Israel and the United States refused to
join the Protocol. Since unlike other parts of the Protocol, Article 1(4) generated much
discord it cannot be regarded as customary law between the PA and Israel, the latter
having remained a persistent objector thereto. Note, however, that insofar as the PA
may be said to possess all the characteristics of a state enumerated in the Montevideo
Convention on the Rights and Duties of States, 1933, 49 Stat. 3097, T.S. No. 881, 165
L.N.T.S. 19, and has been recognized by various states, it may be argued that the conflict
conforms to the traditional definition of an international one. Nevertheless, it is important
in our context to note that the U.N. Inquiry Commission established by the UN
Commission on Human Rights to investigate violations of human rights and
humanitarian law in the Palestinian territories classified the conflict as non-
international, “as Palestine, despite widespread recognition, still falls short of the
accepted criteria of statehood”. See Question of the Violation of Human Rights in the
Occupied Arab Territories, Including Palestine, Report of the Human Rights Inquiry
Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000,
proper classification of the conflict, see Yuval Shany, “Israeli Counter-Terrorism
Measures: Are They ‘Kosher’ under International Law?” in Michael N. Schmitt ed.
Terrorism and International Law: Challenges and Responses (San Remo, International
In the light of the above, it is clear that whereas in the past, it was the law of war which contributed to the generation of IHR law, it is currently the latter which has set the direction for the regeneration of IHL. This development has taken place under the institutional umbrellas of both the ICRC\textsuperscript{97} and the United Nations, and explains the change in their relationship: At the time the UDHR and the Geneva Conventions were promulgated, their rapport could have been measured by the cautious distance each had kept from the other even in instances of close normative parallelism. Time, however, has vindicated the words of the President of the Geneva Conference during the signing ceremony: "our texts are based on certain fundamental rights...the Universal Declaration of Human Rights and the Geneva Conventions are both derived from one and the same ideal",\textsuperscript{98} and the doctrine that was then "only beginning to take shape",\textsuperscript{99} that is, that human rights law is inseparable from humanitarian law, has matured, bridging the conceptual and normative gap that has hitherto kept the two institutions apart. Thus, with the United Nations relying on both human rights and humanitarian norms in order to enhance the protection accorded to the human person in a multitude of conflicts of varying nature, including, but not limited to, the territories occupied by Israel,\textsuperscript{100} the argument that it should not be thus engaged as it encroaches


\textsuperscript{98} II Final Record of the Diplomatic Conference of Geneva International Committee of the Red Cross of 1949 – Section B (Berne, unspecified date) 536.


on the ICRC’s mandate, is legalistically anachronistic.\textsuperscript{101} Indeed, from an institutional perspective, the differences between the ICRC and human rights organizations seem to support the co-application of IHL and IHR law as the two complement each other: the ICRC, precisely because of the confidentiality of its method of operation and its cooperation with the occupying power can often gain access to information withheld from human rights’ agencies; the latter’s appeal to public opinion, on the other hand, may well encourage compliance in situations where the ICRC fails to secure the support of the occupying power.\textsuperscript{102}

The practical substantiation of the Israeli position, that soldiers are more likely to obey the tactically oriented IHL rules than they are the more tenuous, derogable IHR norms, and the related argument, that less protection is actually a better course of action from a humanitarian perspective,\textsuperscript{103} seem not only mutually exclusive, but also unpersuasive:\textsuperscript{104} these assumptions are unsupported by evidence\textsuperscript{105} and further ignore the normative reality of the high threshold required for derogation and


\textsuperscript{102} Such, for instance, was the situation with respect to alleged violations by Turkey in Cyprus in 1974, when it refused to apply IHL but was forced to apply the European HR Convention. See Aristidis S. Calogeropoulos-Stratis, “Droit Humanitaire – Droit de l’Homme et Victimes des Conflits Armes” in Christopher Swinarski, ed., Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet (Geneva, 1984) 655, 657; See generally on this institutional argument, John Quigley, “The Relations Between Human Rights and the Law of Belligerent Occupation: Does An Occupied Population Have a Right to Freedom of Assembly and Expression?” (1989) 12 B.C. Int. & Comp. L. Rev. 1, at 27–28. It should be realized however that the ability of human rights monitoring bodies to apply IHL is constrained by lack of expertise and the narrowness of their mandate.

\textsuperscript{103} See supra text accompanying n. 33–34.

\textsuperscript{104} The logic behind the supposedly ‘purist’ position that the humanization of war is unwarranted as it may encourage its very occurrence and prolong its duration leads to the absurd conclusion that the road to peace should not be paved by normative attempts to reduce human sufferings. From the perspective of the human subject, and, indeed, of civilized practices, this line of argumentation is far less compelling and reasonable than that offered by the paradigmatic fusion of IHL and IHR law.

the non-derogable nature of many core human rights. In fact, some human rights treaties including the ICESCR, CAT, CRC, CERD and CEDAW contain no derogation clauses; and the fact that some rights are derogable does not imply their automatic suspension in emergency situations. This is due to various requirements that have to be met in order to render the derogation permissible, namely, non-discrimination; proportionality; restricted duration; legal basis; consistency with the State's other obligations under international law and, most importantly, that the emergency situation be so severe as to threaten the life of the nation. It should further be noted that while IHL norms are non-derogable in principle, article 5 of Geneva IV does provide states with a certain leeway and flexibility when imperative military reasons, military necessity or reasons of security so dictate. In light of the above, and also recalling that states tend to deny the very applicability of IHL to their invariably unique circumstances in much the same way as they tend to argue that the conditions for derogating from their human rights obligations have already materialized, the observation that generally the possibility of derogation is broader in IHR law than it is in IHL, seems to lose some of its bite.

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106 For example, Article 4(2) of the ICCPR provides that states may not derogate from their obligations with respect to several of the rights, including the right to life; the right not to be subjected to cruel, inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude; the right not to be imprisoned for failure to perform a contractual obligation; the right not to be subject to retroactive penal measures; the right to recognition as a person before the law and the right to freedom of thought, conscience and religion. Cf. European HR Convention, art. 15(2); I/A HR Convention, art. 27(2). On restrictions placed upon the right to derogate, see Human Rights Committee, General Comment General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

107 ICCPR, art. 4. Note that the severe nature of situations, which “threaten the life of the nation” has been articulated to include the following accumulative elements: it must be actual or imminent; its effect must involve the whole nation; it threatens the continuance of organized life of the community and, it must be exceptional. See The Greek Case (Denmark. v. Greece), App. Nos. 3321, 2233, 3344/67 12 Y.B. Eur. Con. Hum. Rts. (1969) 72. See also Special Rapporteur (L. Despouy), Tenth Annual Report on Human Rights and States of Emergency, UN Doc. E/CN.4/Sub.2/1997/19 (1997) para. 82; General Comment 29, supra n. 106, at para. 3.

It is further not altogether clear that the fact that human rights may be subject to derogation under certain situations is any indication that they were not designed to apply in wartime and, in fact, the opposite seems to have been the case: both the American and the European human rights conventions include reference to a "time of war" in their "public emergency" proviso,\(^{109}\) and a similar reference was omitted from the ICCPR because it was felt that the Covenant should not refer to the possibility of war, but not because it was thought that human rights law is inapplicable in times of war.\(^{110}\)

Finally, we find that the argument on the alleged inferiority of the IHR framework to address armed conflict situations is analytically weak: while it may well support the position that IHR law cannot substitute IHL, it fails to counter our argument, that is, that IHR law supplements IHL.\(^{111}\) In its supplementary role, any deficiencies associated with IHR law would not detract from the continued application of IHL, and the former regime would add to, rather than detract from, the protection afforded to potential victims.

The other legal arguments advanced to substantiate the Israeli position seem, in the main, to be based on various distinctions in the nature, and in the thresholds of applicability, of humanitarian and human rights norms.\(^{112}\) It is our position that these legal distinctions, reflective to a large extent of the alleged dichotomy between war and peace, are far less determinate than they, perhaps, appear to be. Indeed, whatever value they may have had in the past from an analytical perspective, has been diminished by their current use as thinly veiled excuses, rather than as convincing legal justifications, for the non-application of human rights in situations of armed conflicts.

The argument regarding the different nature of humanitarian and human rights norms rests essentially on two grounds: first, the absence of the distinction between the first generation of civil and political human

109 European HR Convention, art. 15; I/A HR Convention, Art. 27. See Eyal Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories" (1992) 26 (4) Isr. L. Rev. 2, at 29 ("The adaptability of these instruments to crisis situations attest that their framers conceived them as applicable to wartime as well").

110 Quigley, supra n. 102, at 4.

111 See infra, at Part IV.

112 For legal substantiation of the Israeli position, see supra text accompanying n. 35–41.
rights and later generations of human rights from IHL norms; second, the linguistic difference in the formulation of the norms comprising each regime, a difference reflecting IHL's concern with the behavior of a party to a conflict, as distinct from the IHR's law focus on the individual. We believe this line of argumentation has little merits, as shall be detailed below, but find it interesting to note that the old arguments supporting the distinction within human rights law itself (mainly between ‘negative’ and ‘positive’ rights), are replicated, mutatis mutandis, to uphold the alleged dichotomy between human rights and humanitarian law.

As regards the first ground, the genealogical validity of the distinction between the different generations of human rights notwithstanding, its substantive value is harder to justify. Indeed, even if it were true that there is a clear-cut distinction between the various types of human rights, it is hard to see why that would be relevant to the co-application of IHL and IHR law in armed conflict, especially since IHL comprises both ‘negative’ and ‘positive’ provisions. Furthermore, the arguments supporting a clear distinction within human rights law, that is, between civil and political rights on the one hand, and socio-economic rights on the other hand, have never been too convincing, given the reciprocal relationship between bread and ballot, and given the increased understandings that both kinds of rights contain positive as well as negative components, and that the distinction between the ‘precise’ civil

113 E.g., Geneva IV, art. 38(2), 94, which reflect ‘positive’ rights (obligations to provide medical services and to encourage educational and other cultural pursuits in internment camps), whereas Geneva IV, art. 27 reflects various ‘negative’ rights (e.g., respect for religious convictions).

114 A notion already arrived at by John Stuart Mill – J.S. Mill On Liberty, (Hammondsworth, 1974) (1861) 120–122 – implying that the process by which the liberal state is realized is also the process by which it disappears: the laissez faire state obliterates itself in a process directed at realizing its principles and the socialist, or welfare, aspect of the democratic liberal state becomes the condition of possibility for its very existence. The practical manifestation of this thinking came into fruition in the attack on freedom of contract and of the sanctity of property rights represented by welfare legislation in the United Kingdom before World War I; by Roosevelt's New Deal in between the wars and by the wealth of the activities of the welfare state following World War II. See generally Alan Ryan, “Liberalism” in Roert E. Goodin and Pilip Pettit, eds. A Companion to Contemporary Political Philosophy (Oxford, Blackwell, 1995) 291.
and political rights and the nebulous economic and social rights is fallacious.\textsuperscript{115}

Similarly, it is the nature of the relationship between human rights and humanitarian norms, which renders the attempt to maintain a strict divide between them artificial. Indeed, it is the very fact that IHL comprises the various types of rights that best attests to the genuine interaction that exists between human rights and humanitarian norms. The fact that IHL norms are mostly formulated as a series of duties imposed on combatants, rather than as a series of rights appertaining to individuals, by no means implies the absence of rights. On the contrary, it is this formulation that human rights lawyers find attractive and which explains their resort to humanitarian law: the latter, unburdened by the debates which still impede the implementation of socio-economic rights, is easier to implement. Finally, and most convincingly in this context, is the substantive convergence of rights between IHL and IHR. Grounded in the three fundamental principles identified by Pictet\textsuperscript{116} as underpinning both the Law of Geneva and IHR law — namely, inviolability, non-discrimination, and, the security of person — the core rights to due process\textsuperscript{117} and other judicial guarantees;\textsuperscript{118} including freedom from arbitrary arrest or detention;\textsuperscript{119} freedom from torture or cruel, inhuman and degrading treatment;\textsuperscript{120} the right to non-discrimination;\textsuperscript{121} the

\textsuperscript{115} For example, it is difficult to explain in what sense is freedom of expression, a classic political right, more specific than, say, the right to annual leave, a classic socio-economic right. Thus, the notion that both kinds of rights may be formulated in either a specific, or in a general manner, is more accurate.

\textsuperscript{116} Pictet, \textit{supra} n. 21, at 34–44. Note, however, that Pictet did not think both regimes apply concurrently. For discussion of the manner of incorporation of IHR norms in IHL, see Dinstein, \textit{supra} n. 24, at 347.

\textsuperscript{117} UDHR, art. 8; ICCPR, art. 2, 9, 14; Geneva III, Part III, Section IV, Ch. III; Geneva IV, art. 43, 78.

\textsuperscript{118} E.g., the right to a fair trial is guaranteed in UDHR, art. 10 and ICCPR, art. 14, as well as in Geneva III, art. 104–106 and Geneva IV, art. 71–76, 78, 128; the protection against double jeopardy is guaranteed in ICCPR, art. 14(7) and in Geneva III, art. 86, Geneva IV, art. 117 and Protocol I, art. 75(4)(h).

\textsuperscript{119} UDHR, art. 9; ICCPR, art. 9; Geneva III, art. 21; Geneva IV, art. 42, 78.

\textsuperscript{120} UDHR, art. 5; ICCPR, art. 7; Geneva III, art. 13; Geneva IV, art. 32; Protocol I, art. 75; Protocol II, art. 4.

\textsuperscript{121} UDHR, art. 2, 7; ICCPR, art. 2, 4; Geneva I, art. 12; Geneva II, art. 12; Geneva III, art.
protection of children and the family, the prohibition on slavery, respect for religious rights, rights to health, employment, education and, indeed, the right to life itself, all exist under both regimes of protection. Thus, IHLS's concern with the behavior of combatants, insofar as it is to ensure that combatants respect and uphold the rights of protected persons, far from indicating the alienation between human rights and humanitarian law, underscores their inevitable intimacy. The high point of this substantive overlap is the list of crimes

16; Geneva IV, art. 13, 27; Geneva I-IV, common article 3; Protocol I, art. 75; Protocol II, art. 2.
122 ICCPR, art. 23, 24; ICSECR, art. 10; CRC, art. 2-41; there are many articles in the Geneva Conventions pertaining to this protection, e.g., Geneva IV, art. 24, 27. See generally, Denise Plattner, "The Protection of Children in International Humanitarian Law" (1984) 24 Int. Rev. Red Cross 140; Ilene Cohn, "The Convention on the Rights of the Child: What it Means for Children in War" (1991) 3 Int. J. Refugee L. 100.
123 UDHR, art. 4; ICCPR, art. 8; Geneva IV, art. 42, 43, 51; Protocol I, art. 4(2)(f).
124 UDHR, art. 18; ICCPR, art. 18; there are many provisions in humanitarian instruments pertaining to this right, e.g., Geneva III, art. 34; Geneva IV, art. 27, 33, 35-37, 38(3), 58, 93; Protocol I, art. 61, 75; Protocol II, art. 4(1), 4(3).
125 ICESCR, art. 12; CEDAW, art. 11, 14(2)(b); among the provisions relating to this right in humanitarian instruments are Geneva III, art. 15, 20; Geneva IV, art. 38(2), 56; Protocol I, art. 61; Protocol II, art. 4(2), 17(1).
126 UDHR, art. 23; ICSECR, art. 6; CEDAW, art. 11; Geneva IV, art. 24.
127 UDHR, art. 26; ICESCR, art. 13; CEDAW, art. 14(2)(d); there are various provisions in humanitarian instruments relating to this right, e.g., Geneva IV, art. 40, 94; Protocol I, art. 78(2); article Protocol II, art. 4(3)(a).
128 Neither human rights nor humanitarian instruments establish an absolute guarantee for the right to life, but both include various provisions designed to regulate the conditions under which capital punishment may be imposed. ICCPR, art. 6; Geneva IV, art. 68, 75. Note further that the Protocol I, art. 76-77 and Protocol II, art. 6(4) forbid the carrying out of the death penalty against pregnant women and mothers of small children, a protection also included in article 6(5) of the ICCPR. The right to life is further protected in various IHL instruments in a manner that goes beyond the traditional protection of life as a civil right and more akin to its protection as an economic right, designed to ensure the physical conditions required to be met to sustain life during conflict, e.g., Geneva IV, art. 55; Protocol I, art. 69; ICESCR, art. 11. In the same vein, the rights of the wounded to receive medical care, guaranteed in Geneva I and Geneva II has its far less detailed counterpart in article 12 of the ICESCR.
129 See generally, Doswald-Beck and Vite, supra n. 28, at 105-111; Theodor Meron Human Rights in International Strife: Their International Protection (Cambridge, Grotius Pub. 1987) 17-22.
constituting crimes against humanity and genocide in the Statute of the International Criminal Court, comprising acts that can be committed in all situations, that is, not necessarily in the context of an armed conflict, and whose sole distinction from ordinary human rights violations lies in their egregious and systematic nature. As international criminal law moves to criminalize more and more human rights violations, the significance of classifying primary norms as either IHL or IHR norms decreases. In other words, international criminal law emphasizes the unacceptability of both IHL and IHR violations and accelerates the process of merging the two branches of law.

Further supporting the distinction between IHL and IHR law is the argument pointing to their different thresholds of application: *ratione personae* and *ratione materiae*.130 In terms of personal applicability, IHR law applies to all persons without distinction, whereas the threshold of application of humanitarian law is higher, as it applies only to "protected persons", a category dependent on nationality131 or other status.132 The counter-argument rests on two complementary levels: first, while there is no denying that the application of the Geneva law is more restrictive than the application of IHR instruments, the difference is less extensive than it appears to be: human rights instruments, at times, condition applicability on nationality133 and humanitarian law, at times, applies irrespective of nationality.134 More important is the noticeable trend in IHL to substitute a teleological for a literal interpretation of the nationality test in the face of the nature of most current conflicts: the application of the nationality test *stricto sensu* in conflicts characterized by the disintegration of states would have deprived many people of protection. In order to avoid this result, current jurisprudence provides for a more

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130 See *supra* text accompanying n. 37-41.
131 Geneva IV, art. 4. According to a literal interpretation, then, only nationals of a state that is bound by the Convention are protected whereas nationals of the state in whose hand they find themselves (and in some cases also nationals of co-belligerent or neutral states) do not enjoy this status. See also Tadic, *supra* n. 72, at para. 76.
132 i.e., Whether the person is a combatant or a non-combatant, a distinction fundamental to the laws of war. See *Nuclear Weapons, supra* n. 59, at 257.
133 E.g., ICESCR, art. 2(3); CERD, art. 1(2).
134 Geneva I, art. 12; Geneva, art. 12.
flexible test of nationality. A similar trend accounts for the expansion of the definition of combatants in Protocol I and in related developments designed to ensure that a person involved in an armed conflict would enjoy the status of either a civilian or a combatant. Second, it is precisely in order to prevent a situation where a person is found bereft of the protection of IHL due to its alleged inapplicability, that a safety net is required. The universal application of human rights law provides this safety net.


136 Protocol I, art. 43(2).

137 The very same rationale that has eased the threshold of the personal application of IHL accounts for both the expansion of common article 3 in Protocol II, augmenting the humanitarian protection offered in non-international armed conflicts, and eventually, for the lowering of the threshold of IHL’s application *ratione materiae*, leading to the blurring of the distinction between an international and a non-international armed conflict. Significantly, this move was justified by the ICTY in explicit reference to the heavier weight given to the human rights doctrine than to the State sovereignty doctrine. Tadic, supra n. 72, at para. 97. See also Delalic, supra n. 135, at para. 266; Tadic, supra n. 135, at para. 166. Note, however, that the lowering of the threshold for application of IHL might lead in some cases to undesirable results, as governments’ propensity to use military force, instead of police force, might increase in situations characterized as ‘armed conflicts’.

138 This indeed was the rationale behind the Turku Declaration of Minimum Humanitarian Standards made by a group of non-governmental experts in Finland in 1990 (see supra n. 94), as it was designed to protect human dignity in situations where there is a discrepancy between the scale of abuse and the apparent lack of rules, particularly in situations of internal violence which fall below the threshold of applicability of IHL but within the margins of public emergency. See Theodor Meron and Allan Rosas, “A Declaration of Minimum Humanitarian Standards” (1991) 85 *A.J.I.L.* 373. This declaration generated the decision by the Sub-Commission on Prevention of Discrimination and Protection of Minorities to transmit the declaration to the Commission on Human Rights “with a view to its further elaboration and eventual adoption” (Res. 1994/26, cited in Report of the Secretary General, supra n. 108, at para. 11). In 1995, the Commission of Human Rights, in Resolution 1995/29 (discussed in Report of the Secretary General, supra n. 108, at para. 11), taking note of the Sub-commission resolution, requested that the declaration be sent to governments, international organizations and non-governmental organizations for comments. In 1996, it welcomed an offer by the Nordic countries and the ICRC to organize a workshop to consider the issue. The workshop was held in Cape Town in 1996. For the report of
Finally, policy considerations require that the propensity to invoke IHL as *lex specialis* in a manner which excludes the application of IHR law, be curtailed. As international law becomes ever more complex, there is an increased overlap between its various, hitherto distinct, branches. It is not uncommon to identify two or more legal branches regulating the same factual situation. An expansive *lex specialis* rule, tending to exclude the applicability of relevant general rules in favor of more specific ones, could enable States to evade many of their international obligations. Further, an expansive invocation of *lex specialis* might also introduce disharmonizing tensions into international law, as it would encourage different regulations of similar issues. This is exacerbated by the fact that not all States are party to all treaties that might be relevant to a particular situation. In such circumstances, the sweeping application of *lex specialis* as an exclusionary device could generate considerable confusion. Sound legal policy thus requires the harmonization and co-application of overlapping international norms.

Indeed, the Vienna Convention on the Law of Treaties supports this policy argument. Article 31(3)(c) of the Convention provides that treaty obligations should be construed in the light of other relevant international obligations. In fact, the *lex specialis* rule is not mentioned at all in the Convention. While it is accepted that this omission does not prevent the application of the rule in certain circumstances, it arguably strengthens the view that resort to it should be minimal. Additional support to a

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restrictive use of the *lex specialis* rule could also be found in the case law of a number of international courts and tribunals, which had been willing on some occasions to apply rules deriving from competing legal regimes. 141

The thesis that the protection of human rights does not cease in time of war received a resounding confirmation by the International Court of Justice (ICJ) in the *Nuclear Weapons* Advisory Opinion. 142 While the Court determined that in situations of armed conflict, primacy is given to IHL as the *lex specialis*, 143 it suggested that this primacy does not remove human rights law from consideration. Indeed, the emphasis the Court placed on the humanitarian considerations that inform IHL, underscores the purpose and underlying principles common to both regimes as the rationale for their co-application. 144 The practical effects of this position would thus seem to suggest that gaps in protection of one regime, due to either derogation or inapplicability, may be bridged by the application of the other, 145 and that each affects the interpretation of the other’s norms: international humanitarian law may be used to interpret a human right rule, 146 and human rights’ law influences the proper application of IHL in tilting the balance between military considerations and humanitarian concerns in favor of the latter. 147 The *Nuclear Weapons* Advisory Opinion, upholding the theoretical position that human rights law applies together with IHL in situations of armed conflict, thus confirmed the above-discussed historical trend, cloaking it with the mantle of authority. This


142 *Nuclear Weapons, supra* n. 59, at 240: “The Court observes that the protection of the ICCPR does not cease in times of war, except by the operation of Article 4 of the Covenant whereby certain provisions may be derogated from in times of national emergency”.

143 Ibid.

144 Ibid., at para. 95.

145 See Meron, *supra* n. 26, at 263–276.


147 As it provides a new benchmark for balancing military necessity, unnecessary suffering and proportionality as against humanitarian considerations. See Stephens, *supra* n. 105, at 14.
position has since become commonplace, affecting the work of judicial tribunals as well as the practice of numerous international bodies.

Having thus concluded that the doctrinal argument substantiating the Israeli position as to the great divide between the law of war and the law of peace and the consequential inapplicability of the latter to the Occupied Territories is obsolete, supported by neither current thinking nor by practice, the following section proceeds to address the specific legal argument raised by Israel pertaining to the scope of application of the six human rights conventions to which it is party.

C. The Meaning of the Jurisdictional Clauses of the Human Rights Treaties

In this sub-section the following argument is advanced: the language of the jurisdictional provisions found in four of the six human rights conventions to which Israel is a party, the object and purpose of these treaties, and the interpretation of their jurisdictional clauses in light of their object and purpose, all support the reversal of the presumption in favor of territorial application introduced by article 29 of the Vienna Convention. Indeed, the text of article 29 could and should be construed differently from what is proposed by Israel, as the provision was never designed to block the extra-territorial application of international treaties. This argument is well supported by customary international law pertaining to the application of human rights law in occupied territories, as reflected in the practice of various international human rights bodies. Finally, even the jurisprudence of the Israeli Supreme Court seems to differ in this respect from the position of the Israeli government as it implicitly lends some support to the proposition that human rights law applies in the Occupied Territories.

148 See e.g., Furundzija, supra n. 76, at para. 183; Delalic, supra n. 135, at para. 200; Case No. 11.137 Abella v. Argentina, n.1.OEA/Ser.L/V.97, Doc. 38 (I/A Comm'n H.R., 1997) para. 158
149 For a review of such practice by human rights mechanisms the mandate of which includes both IHR and IHL violations (e.g., ONUSAL) as well as by those, which lack such explicit mandate see O'Donnell, supra n. 100.
150 See supra at part I. The two treaties that do not contain jurisdictional clauses are ICESCR and CEDAW.
151 See supra text accompanying n. 42.
1. The language of the four jurisdiction clauses

All four treaties containing a jurisdictional clause – the ICCPR, CERD, CAT and CRC, use the term 'jurisdiction' in order to describe their scope of application. Two of the four clauses – article 3 of CERD and article 2(1) of CAT – use it in connection with the term 'territory': the obligations of the contracting States appertain to “territories under their jurisdiction”. This implies that the decisive test defining the scope of the covered territory is the exercise of jurisdiction over it by the State party and not the formal existence of sovereignty or lack thereof. In this sense, the arrangement under CERD and CAT is different from the one existing under article 2(2) of the Geneva Conventions that deals with the occupation of the territory of a High Contracting Party (which, according to Israel, implies formal sovereignty). We submit that this textual divergence could lead to considerable differences in the scope of application, as States might be unable to exercise jurisdiction over parts of their sovereign territory or could exercise jurisdiction over territories over which they do not have a valid sovereign title.

Another formulation, found in article 2(1) of the CRC merely refers to the application of the convention with regard to children within the contracting States’ jurisdiction. This is indicative of a personal, not of a territorial, method of application: the decisive test is jurisdiction over persons.

The third formulation is found in what is perhaps the most important of the four aforementioned human rights treaties – the ICCPR. Article 2(1) provides that “[e]ach State party... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” (emphasis added). While the term “its territory” could be understood to imply, as Israel contends, sovereign territory, the term “its jurisdiction” obviously carries a

152 But see Thomas Buergenthal, “To Respect and to Ensure: State Obligations and Permissible Derogations” in Louis Henkin, ed. The International Bill of Human Rights (New York, Columbia University Press, 1981) 72, at 77 (arguing that in situations of belligerent occupation the occupied territory should be deemed as part of the State party’s ‘territory’ under article 2(1)).
different meaning. 153 It provides for the application of the convention to exercises of governmental authority, in a manner that supplements territorial coverage.

Although the two other treaties – ICESCR and CEDAW do not have specific jurisdictional clauses, it would be reasonable to subject them to a jurisdictional regime similar to the one governing their counterpart treaties, as such uniformity is supported by general considerations pertaining to the indivisibility of human rights. 154 Further, there are few, if any, persuasive policy arguments for restricting the scope of applicability of these two treaties, especially in light of the similarity in the nature of treaties such as CERD and CEDAW and the considerable overlap between the CRC and the ICESCR. Indeed, if it is accepted that the application of human rights treaties to all areas subject to a State’s jurisdiction forms part of customary law, then the two treaties, like the four previously mentioned ones, should be similarly construed. 155

2. The Concept of ‘Jurisdiction’ in Light of the Object and Purpose of the Human Rights Treaties

‘Jurisdiction’ is a central concept in determining the scope of application of human rights treaties. Indeed, four of the six human rights treaties protect individuals subject to the jurisdiction of the States parties thereto. They do not, however, define the term ‘jurisdiction’. We believe that a proper definition cannot be divorced from – but rather is connected to – the object and purpose of human rights treaties and of the IHR movement.

Jurisdiction is normally described as “a government’s power to exercise authority” or “a geographic area within which political or judicial authority may be exercised”. 156 It encompasses the power to legislate (jurisdiction

153 This is supported by the principle that text should be construed in a manner which would not result in the redundancy of their terms. Mariposa (U.S. v. Pan.), Award of 27 June 1933, 7 Ann. Dig. (1933–1934) 255, 257 (U.S.-Pan. Claims Comm’n).
155 Vienna Convention, art. 31(3)(c).
156 Bryan A.Garner ed., Black’s Law Dictionary (St. Paul, West Group, seventh ed., 1999) 855. Another possible definition is – “the power, right, or authority to interpret, apply,
to prescribe), the power to resolve disputes (jurisdiction to adjudicate) and the power to implement laws and court decisions (jurisdiction to enforce). In essence, it is a legal manifestation of the ability to rule and to exercise the powers of government.

From both a policy and a philosophical perspective, it is perfectly logical that human rights treaties embrace this broad concept in determining their scope of application. Human rights law is intended to protect individuals from the improper exercise of governmental power. It is also designed to ensure that governments provide for the needs of individuals. In other words, IHR law seeks to ensure human dignity, and governments are the principal agents responsible for implementing the ideology underlying IHR norms and securing the rights of individuals.

A narrow reading of the human rights treaties, limiting their scope of protection to the relationship between governments and only some of the individuals who fall under their sphere of influence (e.g., individuals present within the sovereign territory of the State), and excluding other intense forms of inter-relations – such as the relationship between occupation authorities and residents in occupied territories – is problematic, to say the least, given the focus of human rights law on individual welfare and dignity. This is especially the case in circumstances where such extra-territorial interrelations are exclusive – i.e. in situations where the individual cannot realistically turn to other States for the protection of his or her rights.

The broad application of human rights standards is mandated by the principle of universality, a central tenet of modern IHR law. The idea that all individuals are entitled to fundamental human rights protections derives from a belief in the intrinsic worthiness of the human person. This ideology has consciously moved away from the social contract theories advanced by Locke, Rousseau and others, which had based the idea of natural rights on an implicit intra-societal arrangement. While IHR law was clearly inspired by domestic developments, especially with respect to the content of substantive rights, it has developed on the basis of a different premise – that of universal recognition of individual rights. Indeed, the

principal human rights instruments, including the UDHR, specifically protect the rights of non-citizens, although the scope of protection afforded to the latter group might be more limited than that offered to citizens.\(^{157}\)

Further, reciprocity has never been a central idea in IHR law, as is confirmed by the inalienable nature of human rights\(^{158}\) and by the fact that no human rights instrument links human rights and human obligations (whose very existence is controversial).\(^{159}\) Finally, there is no reason to assume that the relationship between a State and individuals placed under its control in a foreign territory would not involve rights and obligations, albeit, perhaps, of a more limited nature.

In the same vein, the historical arguments pertaining to the intra-State focus of the development of IHR law are unconvincing. Although the primary impetus for creating international instruments for human rights protection was the miserable failure of States to cater to the needs of their citizens, and notwithstanding the fact that the IHR movement relies heavily on domestic law for the implementation of its norms, the rhetoric used by the movement was always that of universal human rights.\(^{160}\) This rhetoric is incompatible with the view that IHR law applies only between a State and its citizens. Indeed, such arguments, invoking history in order to arrest present developments, tend to misperceive the ever-evolving nature of history and of law. Further, it should be remembered that the international human rights movement was developed in reaction to the Nazi atrocities that were committed during World War II. As some of the most outrageous Nazi atrocities were directed at individuals residing in occupied territories, the argument that the IHR movement was only interested in guaranteeing improved protection to a limited class of victims – who reside within the oppressive regime's sovereign territory – and not to all potential victims of such regimes, seems rather weak. Hence, the background historical conditions also lend support to a broad approach towards human rights' sphere of application.

In our view, a sensible interpretation of the term 'jurisdiction' would equate it with the actual or potential exercise of governmental power vis-

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\(^{157}\) See e.g., UDHR, art. 14; ICCPR, art. 13; ICESCR, art. 2(3).

\(^{158}\) See e.g., UDHR, preamble; ICCPR, preamble; ICESCR, preamble.

\(^{159}\) See e.g., Saul, supra n. 56, at 580–601.

\(^{160}\) See e.g., UN Charter, art. 55(c); UDHR, preamble.
à-vis all affected individuals. This approach is conduct-oriented. It emphasizes the duty of States to conduct their operations, whenever individuals are under their control or might be directly affected by their actions, in accordance with human rights standards. Consequently, all interactions between a government and individuals subject to its power would prima facie fall under the concept of 'jurisdiction'. These interactions comprise the relationship between States and individuals situated within their sovereign territories as well as other territories governed by their laws; the relationship between an occupying power and the occupied people in occupied territories; and, the relationship established by extra-territorial acts of government undertaken by one State in the territory of another State.

The first category of interaction presents no major difficulties as individuals subject to a State’s laws are clearly subject to that State’s jurisdiction. Further, in such circumstances the applicability of national law – which is an apparent form of exercise of governmental authority – is normally easily ascertainable.

The second category is more challenging, as it requires the establishment of a threshold level of control needed in order to define specific forms of domination as ‘occupation’. Such a threshold was articulated by the Supreme Court of Israel in Tsemel v. Minister of Defense. The Court opined there that the potential power to exercise governmental powers exclusively – which depends inter alia on the inability of the lawful sovereign to exercise such power – and not the formal establishment of a legal administration, is the decisive criterion in determining whether a territory is subject to the effective control of another State, and is thus an area under belligerent occupation. The potential to exercise governmental powers over individuals would place

161 Cf. H.C.J. 320/80, Kawasma v. Minister of Defense, 35(3) P.D. 113, 127 (Opinion of Justice H. Cohn). For discussion of the position of the Israeli Supreme Court regarding the applicability of rule of law standards to government acts or omission in the West Bank and Gaza Strip, see infra Part III, section 6.


the latter under the effective control of a State party, even if control is limited in time and place, and subject them to *its jurisdiction*. This approach would lead to the application of human rights treaties in cases of belligerent occupation, bringing about greater harmonization in the application of IHL and IHR law, as well as in other cases involving control over a foreign territory (colonization, consent-based military presence in a foreign territory, etc.).

Finally, situations involving extra-territorial exercise of governmental authority, through official State acts committed abroad, could also be viewed as falling under the 'jurisdiction' of the acting State and result in subjecting directly affected individuals to the State's jurisdiction. This might include, *inter alia*, law-enforcement operations taking place in the territory of a foreign state (with or without its permission); military operations; and, the exercise of authority by diplomatic and consular staff with respect to persons seeking their services. Since such official acts have the potential to undermine many of the interests protected by IHR law, the object and purpose of IHR law would be better served by the application of human rights standards to constrain governmental action.

Still, two caveats to the last proposition need to be stated. First, the scope of protection in extra-jurisdiction cases depends on the relevant circumstances and the nature of the interaction between the government and the individual. Different exercises of jurisdiction entail different levels of human rights obligations (e.g., an extra-territorial bombing operation would usually raise right to life issues, but not freedom of association or right to food issues; arbitrary refusal to renew passports might raise freedom of movement concerns, but probably no right to life considerations). Second, considerations of fairness and expediency require that States should not bear responsibility for indirect or unforeseen consequences of their actions in areas outside their control.164 In other words, mere causation should not suffice, and a more extensive level of

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164 For example, domestic economic decisions that have international economic implications, and necessarily, global effect upon human conditions, would not bring affected individuals in foreign countries under the jurisdiction of the State in question.
'culpability' has to exist in order to hold governments accountable for injury to individuals not subject to their control, and thus not placed under their responsibility. This position is generally supported by the Commentary to the ILC Draft Articles on State Responsibility as well as by the jurisprudence of human rights bodies.

Israel, as was discussed in section II above, seems to construe the term "jurisdiction" in a far narrower manner than the one advanced here, equating it with the "application of national laws". It therefore argues that the term could mandate the application of the treaties to areas situated outside the sovereign territory of the State but nonetheless subject to its domestic laws, but not to other areas. In the Israeli context, this would probably mean that the conventions should apply to disputed areas, which Israel had either annexed or subjected to its domestic legislation, such as East Jerusalem and the Golan Heights, but not to occupied areas, which are not subject to Israeli law. The application of the treaties may also encompass, perhaps, Israeli settlers living in the Occupied Territories, as they are subject to the personal jurisdiction of Israeli law in a number of criminal and civil law areas.


166 See infra at Part III, section (e).

167 Such as occupied territories governed by the pre-occupation local law.

168 One could argue however that this position does not necessarily negate the applicability of the conventions to the West Bank and Gaza Strip, as occupied territories are governed by laws promulgated by military commanders, who are State officials. Law promulgated by State officials is arguably State law.

169 Military Commanders in the West Bank and Gaza Strip have issued official proclamations applying certain portions of Israeli legislation to Israeli citizens residing in the Occupied Territories. See e.g., Decree on Local Councils Administration (Judea and Samaria) No. 892, 1991; Benvenisti, supra n. 17, at 135–139. The enactment of specific laws to govern the rights and obligations of Israeli settlers in the West Bank and Gaza Strip (but not of Palestinians residing in those areas) has been criticized by human rights groups, who view such special legal treatment as discriminatory. See e.g., Amnesty International, Israel and the Occupied Territories: The Issue of Settlements must be Addressed according to International Law (London, 2003) http://web.amnesty.org/library/Index/ENGMDE150852003?open&of=ENG-370.
We believe the Israeli position is untenable. First, it fails to provide for a reasonable distinguishing criterion between protected and unprotected interactions: why should only the formal application of legislation and not other displays of governmental power determine the scope of protection afforded to individuals? Second, the Israeli position creates an incentive not to apply domestic laws in areas which are subject to national control but fall outside the scope of protection of international instruments, thereby depriving individuals residing in such areas, and having no other government that can espouse their rights, from the protection of both domestic and international law. Finally, as was just discussed, the aforementioned stand runs contrary to fundamental tenets underlying human rights law, most notably the principle of universality of human rights.

3. The Interpretation of Article 29 of the Vienna Convention

Another argument made by Israel involves Article 29 of the Vienna Convention on the Law of Treaties, which allegedly creates a presumption in favor of territorial application of international treaties.170 We submit that article 29 could and should be read differently and in a manner that conforms to, rather than cancels out, the principle of universality.

The language of Article 29 is concise: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party with respect of its entire territory.” Aust argues, in line with the Israeli position, that this entails the conclusion that the normal application of international treaties would be to the metropolitan area of a country and not to overseas areas.171 We disagree. It seems that the plain language of the article merely prescribes a minimum scope of application – the entire territory of the State (this is often a sensitive issue in federal States, where the power of federal authorities to undertake international obligations on behalf of federal units might be challenged).172

170 See supra text accompanying n. 42.
172 Ibid., at 169.
and there is nothing in the text which indicates that article 29 intended to restrict the extra-territorial application of treaties.

A review of the *travaux préparatoires* of the Vienna Convention largely confirms our understanding of the text. The debate before the International Law Commission (ILC) on this article largely focused on the applicability of treaties to territorial units within federal states, and on whether declarations of partial territorial applicability would be viewed as reservations. following a proposal by some members to clarify the extra-territorial applicability of some treaties (e.g., on law of the sea matters), the Special Rapporteur opined that such addition is unnecessary as “the [rule on territorial application] hardly seems open to the construction that by implication it excludes the application of a treaty beyond the territories of the parties”. Further, the final report of the ILC stated: “to attempt to deal with all the delicate problems of extra-territorial competence in the present article would be inappropriate and inadvisable.” Only one delegate in the international conference mentioned the possibility of inferring from the text of article 29 that treaties would generally apply only to sovereign territory.

Finally, even if article 29 did envision the creation of an interpretative presumption against extra-territorial application of treaties, surely this presumption can be refuted if the nature of the obligations introduced by the treaty in question does not sit well with territorial limitations. Such indeed is the nature of human rights obligations. The principle of universality entails wide applicability of human rights instruments to all individuals subject to the power or jurisdictional reach of State parties.


174 *ibid.*, at 66.


Hence, an opposite presumption – providing for extra-territorial application – ought to be applied with regard to human rights treaties.

4. Application of the Proposed Approach to the Specific Language of Human Rights Conventions

The specific language of the six human rights conventions to which Israel is party accommodates our broad approach to their scope of applicability. No particular difficulties arise with respect to CERD, CAT and CRC as these treaties condition their application upon ‘jurisdiction’. It might be argued, however, that CERD and CAT have a slightly more limited scope of application than CRC, since they encompass territories under the contracting State’s jurisdiction, whereas the CRC covers individuals subject to the contracting State’s jurisdiction. This difference, it may be argued, supports the removal of the above-discussed category III cases (extra-territorial official acts) from the purview of CERD and CAT. Whatever the merits of this argument, it seems to be of little practical relevance given the considerable overlap between these two treaties and the ICCPR, which, as we will argue, encompasses all three categories of jurisdiction.177

The scope of application of the ICCPR presents a more subtle issue given the Covenant’s prominent status under IHR law and the ambiguous language of its jurisdictional clause. Specifically, the decisive question is whether the conditions specified in article 2(1) – territory and jurisdiction – are conjunctive or disjunctive. The plain language of the text arguably accommodates both possibilities. Further, the travaux préparatoires of the Covenant are unclear on this point.178 Ultimately, the question is one of contextual and teleological interpretation.

While there is a body of opinion preferring a narrow construction of

177 It could also be noted that CERD provisions involve, to a large degree, positive obligations, which have inherently limited extra-territorial relevance.

178 The discussion that took place before the Human Rights Commission and the 3rd Committee of the General Assembly focused on whether to add or delete the reference to territory, in addition to the reference to jurisdiction. At the end of the day, the view that prevailed was that failure to mention territory might be interpreted as requiring
the scope of application of the Covenant,\textsuperscript{179} this is clearly not the dominant view. Most experts, including most members of the HRC, which is responsible for the implementation of the ICCPR, have opted for a broader approach and construe the two conditions as disjunctive.\textsuperscript{180} The dominance of the latter view is further supported by the text of article 1 of the First Optional Protocol (OP),\textsuperscript{181} which authorizes the HRC to review communications from individuals subject to the \textit{jurisdiction} of States parties to the OP, dispensing altogether with the link to territory. Since the procedural right to bring communications cannot exceed the substantive right to enjoy protection under the Covenant,\textsuperscript{182} it would seem strange to construe article 1 of the OP more broadly than article 2(1) of the ICCPR. It is thus more plausible to read the latter as containing two alternative (though usually overlapping) conditions, and to read the OP as encompassing only one of them. Most importantly, the theoretical and policy considerations discussed above also support an expansive interpretation of the scope of application of the ICCPR as it conforms to the object and purpose of the Covenant.\textsuperscript{183}

States to ensure the human rights of their nationals abroad in ways other than through regular diplomatic channels. Marc J. Bossuyt, \textit{Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights} (Dordecht, M. Nijhoff, 1987) 53–55. There is no indication that the delegates considered the application of the Covenant to extra-territorial official State acts or to situations of belligerent occupation.\textsuperscript{179} See e.g., Schindler, \textit{supra} n. 47, at 939; Schweb, \textit{supra} n. 47, at 863; Meyrowitz, \textit{supra} n. 47, at 1087. It is also been noted above that the MWC opted for a clearer disjunctive formulation. See \textit{supra} n. 46. This arguably supports a conjunctive reading of ICCPR, art. 2(1).


\textsuperscript{182} See also P.R. Ghandhi, \textit{The Human Rights Committee and the Right of Individual Communication} (Aldershot, Hants, England, 1998) 129.

\textsuperscript{183} Vienna Convention, art. 31(1).
Finally, with regard to the ICESCR – one of the two treaties lacking an explicit jurisdictional clause – there are several indicators in its text and in the related practice of the ESCR Committee that suggest that it was intended to encompass extra-territorial areas subject to the jurisdiction of the State parties. Article 14 of ICESCR specifically addresses territories under a State party’s jurisdiction other than its “metropolitan territory” and article 1(3) applies with regard to State Parties controlling Non-Self-Governing Territories. It is also notable that in its first General Comment, the ESCR Committee required States to report upon the extent to which the Covenant is implemented with respect to “all individuals within its territory or under its jurisdiction”. The Draft Optional Protocol to the ICESCR, designed to institute a complaint mechanism, uses the formulation – “all territories subject to its jurisdiction” to describe its scope of application over State parties.

Our position that the scope of application of human rights treaties should be broadly construed is further supported by the case law of various international human rights monitoring bodies. This jurisprudence is discussed in the following sub-section.

5. The International Jurisprudence on Extra-Territorial Application of Human Rights Treaties in Occupied Territories

The question of the territorial application of human rights treaties has been the subject of litigation before a number of human rights bodies, including the HRC, the ECHR and the Inter-American Human Rights Commission (I/A HR Comm.). The issue has been further addressed during the review process of periodic reports submitted to the various UN treaty bodies. The leading precedents pertaining to this issue thus merit our attention and analytical review.

The HRC held on a number of occasions that the extra-territorial exercise of governmental authority over individuals could fall under the

scope of article 1 of the OP to the ICCPR, which provides that the Committee would be authorized to “receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant” (emphasis added). It is important to note that although not formally binding, HRC precedents do carry significant weight, as the HRC is the most prominent international organ responsible for overseeing compliance with the ICCPR.186

So far, the most impressive precedents rendered by the HRC on the question of the scope of applicability of the Covenant are Lopez Burgos v. Uruguay187 and Casariego v. Uruguay.188 Both cases dealt with allegations that Uruguayan secret service agents kidnapped Uruguayan citizens who were residents in other South American countries, in violation of their rights under the ICCPR. In rejecting the Uruguayan position that the Covenant and Protocol cover only violations occurring within a State’s territory, the HRC held, using identical language in both cases, that:

“The reference in article 1 of the Optional Protocol to ‘individuals subject to its jurisdiction’ does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred. Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights “to all individuals within its territory and subject to


187 Burgos, supra n. 58.

188 Casariego, supra n. 58.
its jurisdiction', but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it... 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". \(^{(189)}\) (emphasis added)

The Committee also noted that a different interpretation with regard to the scope of protection would run contrary to article 5 of the ICCPR, which prescribed that the Covenant should not be construed in a way permitting acts aimed at the destruction of the rights and freedoms protected by the ICCPR. \(^{(190)}\)

This case is of fundamental importance to our topic as it supports the position that it is the nature of the relationship between the State and the individual and not the place of commission of the alleged violations, which is the weightier consideration in determining applicability. \(^{(191)}\) In other words, the Covenant is construed to impose general obligations of conduct, which apply in the context of certain de facto relations of power — when an individual is placed under the effective control of a government or is directly affected by its actions. This must entail, inter alia, that situations of belligerent occupation and other forms of political domination \(^{(192)}\) should fall under the scope of the ICCPR (and arguably other conventions as well).

\(^{(189)}\) Burgos, supra n. 58, at para. 12.2–12.3; Casariego, supra n. 58, at para. 10.2–10.3.


\(^{(191)}\) See McGoldrick, supra n. 190, at 180.

\(^{(192)}\) For example, the HRC held in 2002, in line with this approach, that Macau – an area
It should be noted, however, that one notable Committee member, Prof. Christian Tomuschat appended an individual opinion to the Lopez Burgos and Casariego decisions, criticizing the broad language used by the HRC and suggesting that the Covenant was never intended to encompass complex situations, such as protection of citizens outside a State’s territory or occupation of a foreign territory, in which “objective difficulties” impede the implementation of the ICCPR. Still, even Tomuschat conceded that “willful and deliberate attacks” by States against their citizens living abroad are covered by the Covenant.

We believe that Tomuschat’s position is flawed and that the majority view is preferable. First, the distinction Tomuschat offers between ‘purposeful violations’ and ‘objective impediments to implementation’ goes to the substance of the obligations – in particular to the State’s mens rea – and not to the Covenant’s territorial scope of application. Hence, it cannot serve as a rational basis for a narrow reading of the jurisdiction ratione loci and it would be more sensible to consider the practicability of implementing specific rights in specific contexts on a case-by-case basis. Second, the emphasis Tomuschat puts upon the protection of citizens is incompatible with the principle of universality, which accords fundamental protections to all individuals regardless of their nationality. Third, Tomuschat’s assertion that it would be difficult to apply the Covenant in extra-territorial circumstances is too broad in nature, as one could easily imagine circumstances in which extra-territorial application of human rights (e.g., control by a metropolitan State of non-metropolitan territory) would be easier to attain than ‘normal’ application inside the sovereign territory of the State (e.g., in the case of countries torn apart by civil war). Finally, Tomuschat attributes excessive weight to the intent of the drafters, which until 1999 was subject to Portuguese administration – was covered until the date of its transfer to China by the ICCPR and OP, notwithstanding the lack of sovereignty by Portugal over the area. See e.g., Comm. no. 925/2000 Koi v. Portugal, UN Doc. CCPR/C/73/D/925/2000 (2002).

193 Burgos, supra n. 58, Individual Opinion (Tomuschat); Casariego, supra n. 58, Individual Opinion (Tomuschat).

194 Burgos, supra n. 58, Individual Opinion (Tomuschat); Casariego, supra n. 58, Individual Opinion (Tomuschat).

195 For support, see McGoldrick, supra n. 190, at 181–82.
which is no longer a generally accepted method of treaty interpretation\(^\text{196}\) – especially with regard to a ‘constitution-like’ instrument such as the ICCPR.\(^\text{197}\)

Additional support for the predominance of the substantive relations test over the territorial test can be found in the *Uruguayan Passports* cases.\(^\text{198}\) In these cases the HRC held that refusal by consular officers operating in consulates abroad to renew passports of fellow citizens who reside outside their country of nationality is covered by the Covenant: “The issue of a passport is clearly within the jurisdiction of the Uruguayan authorities and [the applicant] is ‘subject to the jurisdiction’ of Uruguay for that purpose”.\(^\text{199}\) The Committee also noted that a different interpretation would render meaningless the petitioners’ right to freedom of movement, protected by article 12 of the ICCPR.

Finally, in a relatively large number of cases, the UN treaty bodies have accepted the proposition that State A is responsible for human rights violations taking place in State B, if the “necessary and foreseeable consequence” of a decision made by State A with regard to a person subject to its jurisdiction will be the violation of that person’s rights in State B.\(^\text{200}\) Hence, States seeking to extradite or deport persons subject at present to their control might be required to refrain from doing so if the persons in question are likely to be exposed as result of their removal to human rights violations in the destination States. This line of cases is consistent with the notion of the extra-territoriality of human rights obligations of

\(^{196}\) Vienna Convention, art. 31.


\(^{199}\) *Lichtensstein*, supra n. 198, at para. 6.1; see also *Vidal Martins*, supra n. 198, at para. 7; *Montero*, supra n. 198, at para. 5; *Varela Nunez*, supra n. 198, at para. 6.1.

States over persons subject to their effective control or directly affected by their actions.\textsuperscript{201} We also submit that the ‘necessary and foreseeable consequence’ test serves as a convenient yardstick to evaluate the outer limits of extra-territorial jurisdiction.

The question of the scope of application of the UN human rights treaties has also arisen in the context of treaty-body sessions dedicated to the evaluation of periodic reports submitted by State parties. The approach taken there largely conforms to the ‘effective control’ or ‘direct effect’ approach adopted in the individual cases discussed above. Thus, for

\textsuperscript{201} The outer-limit of the jurisdictional reach of the ICCPR was discussed in passing in \textit{Quinteros v. Uruguay}. In that case the Committee reviewed a communication submitted by the mother of an alleged torture victim, who claimed that both her daughter and herself ought to be viewed as human rights victims – the daughter by reason of the numerous human rights abuses she suffered, and the mother by reason of the mental anguish caused to her by reason of her daughter’s disappearance. Acting \textit{proprio motu}, the Committee noted that the complainant is no longer a Uruguayan resident. It therefore requested her to ascertain that she was subject to the jurisdiction of Uruguay, at the time of the alleged violations. Comm.\textit{Quinteros v. Uruguay}, U.N. Doc. CCPR/C/ OP/2 at 138, para. 2, 14 (1990) Views adopted in 1983). This approach is indicative of rejection on the part of the Commission of mere causation as a sufficient jurisdictional link. The victim must be present in the violating State’s territory or be subject, in a different way, to that State’s control. For support, see \textit{W. v. U.K.}, App. no. 9348/81, 32 Eur. Comm’n H.R. D. & R. (1983) 190 (UK is not responsible for anguish caused to persons within its territory by reason of a murder that occurred outside its territory, without any involvement on the government’s part). Still, in \textit{Mbenge v. Zaire}, the Committee held that faulty trial \textit{in absentia} proceedings resulting in a death penalty are in violation of the complainant’s right to fair trial and to life, notwithstanding the fact that he was no longer a resident of Zaire at the time of the proceedings. Comm. no. 16/1977 \textit{Mbenge v. Zaire}, U.N. Doc. CCPR/C/OP/2 at 76 (1990) Views adopted in 1983). This decision could imply that jurisdiction may encompass legal, as well as physical presence in the relevant jurisdiction. Similar issues have arisen in two recent cases before the HRC. In one case, an Irish citizen residing in Australia challenged the compatibility of Irish electing laws, which bar non-residents from voting in national elections. Ireland argued that the author of the communication is not subject to its jurisdiction. The case was dismissed however on other grounds. Comm. no. 1038/2001 \textit{Colchuiin v. Ireland}, UN Doc. CCPR/C/77/D/1038/2001 (2003). In another case, an American citizen brought a complaint against Australia for refusing his family migrant visas by virtue of his daughter’s medical condition. This case was also dismissed on other grounds and the Committee did not express its opinion on the Australian arguments that the applicant is not subject to its jurisdiction. Comm. 978/2000 \textit{Dixit v. Australia}, 28 April 2003, UN Doc. CCPR/C/77/D/978/2001 (2003).
instance, in 1992 the HRC urged Yugoslavia to refrain from supporting human rights violations committed in areas situated outside the territory of the rump Federal Republic of Yugoslavia. By contrast, it noted in its 1994 Concluding Observations on Cyprus that “[Cyprus] is not in a position to exercise control over all of its territory and consequently cannot ensure the application of the Covenant in areas not under its jurisdiction.” These two decisions, and a number of other decisions rendered by various UN treaty-bodies and other UN agencies are indicative of the dominance of the effective control and direct effect tests over formal sovereignty in evaluating the application of the ICCPR.

A concise summation of the HRC position on the matter was provided by the then Committee member (and now ICJ Judge) Rosalyn Higgins:

“As regards the question of jurisdiction, the Committee had always maintained that States were responsible for ensuring respect for the human rights proclaimed in the Covenant when their representatives were implicated and when their acts affected human beings, even outside their national territory.” This must mean, as is indeed explicitly stated by the HRC in a recent General Comment, 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.”

207 Human Rights Committee, General Comment No. 31 on Art. 2 (The Nature of the
The scope of application of human rights has also arisen in the context of the European Convention on Human Rights (EHR Convention), where the issue is regulated by article 1, which provides that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention" (emphasis added).\textsuperscript{208} One of the most contentious jurisdictional questions, which came before the ECHR, pertained to the applicability of the EHR Convention to the situation in Northern Cyprus. In 1974, Turkey invaded Cyprus and established in the Northern part of the country, an area comprising some 40\% of the island's territory, a puppet-state – the Turkish Republic of Northern Cyprus (TRNC). No State in the world, with the exception of Turkey, had recognized that new State, and most states and international institutions continue to view the area as a territory under Turkish belligerent occupation. Since Turkey is a party to the EHR Convention, the question of the applicability of the Convention to Turkey's acts committed in Northern Cyprus has been examined on several occasions.

The first case involved two joined complaints brought by Cyprus against Turkey in 1974 and 1975 before the European Commission on Human Rights. In its 1976 report on the consolidated complaints, the Commission held that the duty of States parties to secure rights to "everyone within their jurisdiction" is not limited to persons within their national territory. Specifically it held that "nationals of a State, including registered ships and aircraft, are partly within its jurisdiction wherever they may be, and that authorized agents of a State, including diplomatic or consular agents and armed forces not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property... [T]he Commission's competence... cannot be excluded on the grounds that

\textsuperscript{208} It should be noted that European HR Convention, art. 56 authorizes parties to apply, by way of notification, the Convention for all "all or any of the territories for whose international relations it is responsible". However, in \textit{Loizidou} the Court held that this provision does not restrict the application of the Convention with respect to extra-territorial acts committed by State organs. \textit{Loizidou v. Turkey}, 310 Eur. Ct. H.R. (ser A)(1995) 23.
Turkey... has neither annexed any part of Cyprus nor... established either military or civil government there" (emphasis added). Consequently, the Commission held that to the extent that the armed forces of Turkey exercise control over persons or property in Cyprus, the EHR Convention covers these interactions.

In the last decade, the ECHR has rendered two additional influential decisions on the application of the EHR Convention to Northern Cyprus. In *Loizidou v. Turkey*, a case brought by a Greek-Cypriot citizen, the Court, like the Commission in the first stage of the proceedings, accepted jurisdiction over the case notwithstanding Turkey's objection that the complaint pertains to events falling outside its territorial jurisdiction. The Court explained its position in the following manner:

"the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration" (emphasis added). The Court even adopted the view that the limitation of its jurisdiction to the sovereign territory of a State party, by way of a reservation to a declaration of acceptance of its jurisdiction, would be invalid,


211 *Loizidou, supra* n. 208, at para. 62.
as it would undermine the effectiveness of the Convention.\textsuperscript{212} Finally, the Court held that the Convention also applies with regard to official State acts which produce extra-territorial effects, regardless of their place of commission.\textsuperscript{213}

In the merits stage of the case, the Court came to the conclusion that Turkey incurs responsibility for human rights violations in Northern Cyprus (in the circumstances of the case – denial of the petitioner’s right to property). It held that Turkey exercises effective control over the area, as “is obvious from the large number of [Turkish] troops engaged in active duties in northern Cyprus”.\textsuperscript{214} The Court also noted that Turkish troops actively prevented the petitioner from crossing the border to North Cyprus.\textsuperscript{215} Hence, both jurisdictional tests – effective control and direct effect of official State action, led to the imposition of legal responsibility upon Turkey.

The Convention’s applicability to Northern Cyprus was reaffirmed in the \textit{Cyprus v. Turkey} case,\textsuperscript{216} decided by the ECHR in 2001. This inter-State case involved charges that Turkey incurs responsibility for a number of human rights violations, which took place in Northern Cyprus. In rejecting Turkey’s objection to its jurisdiction,\textsuperscript{217} the Court restated its reasoning in \textit{Loizidou} and added an important additional consideration:

“Having regard to the applicant Government’s continuing inability to exercise their Convention obligations in Northern Cyprus, any other finding would result in a regrettable \textit{vacuum} in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention’s fundamental safeguards and their

\textsuperscript{212} \textit{Ibid.}, at para. 72–75.
\textsuperscript{213} \textit{Ibid.}, at para. 62.
\textsuperscript{215} \textit{Ibid.}, at para. 54–55.
\textsuperscript{217} It should be noted that Turkey withdrew from the proceedings before the Court. However, the Court examined the objections it raised in the first stage of proceedings before the European Commission of Human Rights.
right to call a High Contracting Party to account for violation of their rights in proceedings before the Court."\(^{218}\) (Emphasis added)

In other words, the Convention should be construed as encompassing the protection of individuals in ‘vacuum areas’ – i.e., areas which no longer fall under Cyprus’ control, through the extension of the scope of Turkey’s obligations. Clearly, this reasoning has considerable implications on the question before us, where a similar protection vacuum exists.

The 2001 Bankovic case merits our special attention, as it appears that the Court has retreated from its hitherto expansive position with respect to the scope of applicability of the Convention.\(^{219}\) The case dealt with the responsibility of NATO member states (who are also state parties to the EHR Convention) for violating the rights of Yugoslav citizens during the bombing of a TV station in Belgrade on 23 April 1999 in the midst of the Kosovo crisis. The Court rejected the contention that the victims were subject to the jurisdiction of the states involved in the attack on Yugoslavia. Specifically, it held that article 1 of the EHR Convention should be construed in light of the generally accepted rule of international law which permits states to exercise jurisdiction only within their own territory,\(^{220}\) “other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case”.\(^{221}\) The Court also noted that the past practice of state parties involved in extra-territorial military operations does not reveal a belief that the Convention is applicable in these circumstances. Further, the Court relied on the Convention’s travaux préparatoires as evidencing support for a restrictive reading of the term ‘jurisdiction’. Finally, it concluded that the approach presented by the applicants amounts to an assertion that any act imputable to a state party entails the application of the Convention, and that were this indeed the case, the words “within its jurisdiction” would have become redundant.\(^{222}\)

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218  *Cyprus v. Turkey*, supra n. 216, at 25.
219  *Bankovic*, supra n. 48.
222  *Ibid.*, at para. 75. The Court referred to the formulation found in Common article 1 to
The decision is disappointing in many respects, as it essentially removes some of the most effective IHR protections available to individuals during wartime and seems to retreat from the position embraced in *Loizidou* according to which official state acts that directly affect individuals must always comply with human rights standards.\(^{223}\) Most worrisome is the Court’s emphasis on the locale of alleged violations – namely, on the fact that the victims were situated in Yugoslavia – a state not party to the EHR Convention. This served the Court to distinguish the case from *Cyprus v. Turkey* (2001), where it was held that the Court should strive to construe the Convention in a way that minimizes a vacuum in its system of protection. According to the Court in *Bankovic*, the ‘anti-vacuum’ presumption would only apply within the Convention’s area of protection\(^{224}\) – e.g., where one state party exercises effective control over an area belonging to another state party.

We find the reasoning of the Court hardly convincing. In essence, the Court took a position which views human rights violations by state parties, egregious and deliberate as they might be, as not prohibited by the EHR Convention, as long as they are committed outside the territory of the Council of Europe countries. This can hardly be justified from a moral, legal or even a practical perspective (e.g., the difficulty of training soldiers to conform their operations with numerous codes of conduct – depending on the ring of operations).\(^{225}\)

We would like to take issue with some additional key parts of the Court’s reasoning. In reaching its conclusion that the bombing operation did not

\(^ {223}\) *Loizidou*, *supra* n. 208, at para. 62.

\(^ {224}\) It is perhaps ironic that the Court uses the term ‘vacuum’ in its decision in order to support the conclusion that the Convention cannot be construed in detachment from other rules of international law, including rules limiting the exercise of extra-territorial jurisdiction in the territory of foreign States. *Bankovic*, *supra* n. 48, at para. 57.

\(^ {225}\) See *Happold*, *supra* n. 190, at 88 (the distinction resorted to by the Court is ‘distasteful’)

*Cf. Burgos*, *supra* n. 58, at para. 12.2–12.3; *Casasiego*, *supra* n. 58, at para. 10.2–10.3 (referring to the ‘unconsciousable’ nature of such distinctions).
amount to an assertion of effective control, the Court rejected a major argument advanced by the applicants: that the concept of effective control could be divided into various aspects of control, and that the scope of application of the Convention should be modified in light of the scope of control actually exercised by the state parties. We feel that the Court’s position is far too rigid and divorced from both theory and practice: the concept of jurisdiction can, and in fact must, be viewed as circumstances-dependent, and open to flexible application. There are many examples that support the proposition that the scope of the obligations introduced by human rights conventions change in light of the circumstances and intensity of the interaction between the state and the protected individuals. For example, a number of precedents (including one Strasbourg case) have established that consular officers must not arbitrarily refuse to issue new passports to citizens living abroad. In fact, the obligation of diplomatic officers to respect human rights has been reaffirmed in the Bankovic decision itself. However, it would be unreasonable to argue that diplomatic officers are obliged to provide individuals requiring their services with food or health services as such provisions would be beyond their scope of authority and material ability. Similarly, a short-term occupying force in a foreign country would be exempt from applying many of the positive rights in the Convention or the appended Protocols (e.g., to develop an education system in the territory), as its foreseen scope of temporal control is too limited. Thus, while surely there can be divergent opinions on whether control of the airspace constitutes a form of effective control – we submit that it is, and that it consequently entails limited human rights obligations, generally consistent with IHL obligations – we


227 See supra discussion of the Uruguayan Passport cases. These cases are also supported by Strasbourg case law. See App. no. 1611/62, X v. F.R.C., 8 Y.B. Eur. Conv. H.R., (1965) 158 (acts of consular officials abroad could generate responsibility under the Convention).

228 Bankovic, supra n. 48, at para. 73.
believe that the Court’s binary approach in ruling out the possibility of the existence of specific forms of effective control, is erroneous.

In another weak part of the *dicta*, the Court advocated the position that the disinclination of international law to authorize extra-territorial exercises of authority by one state in the territory of another should lead to a narrow construction of the extra-territorial effect of the ECHR Convention.\(^{229}\) In other words, it was posited that international law creates an anti-extra-territoriality presumption. Again, this is an odd conclusion. First, there is no comprehensive prohibition under international law against extra-territorial official acts, and such acts take place on a daily basis with the consent of the State in whose territory the operations occur (e.g., issuance of travel documents; military assistance, etc). There is no reason to release governments from shouldering responsibility for human rights violations in such circumstances. Furthermore, even when extra-territorial authority radiates across borders unlawfully, it would be seriously flawed from a policy perspective to reward the violator with an exemption from human rights responsibilities. Once again, the need to ensure the effective protection of individuals counsels in favor of separating the question of lawfulness of extra-territorial acts under general international law and compliance with IHR standards.\(^{230}\)

While *Bankovic* represents a regrettable withdrawal from the ‘effective control’ or ‘direct effect’ approach and opts for a narrower view of ‘jurisdiction’ than hitherto advanced by the ECHR, it is important to delineate its effect. The Court in *Bankovic* held that mere causation of injury to individuals does not entail the extra-territorial application of the Convention. Since it did not regard the NATO extra-territorial bombing operations as a manifestation of effective control, it concluded that the Convention is inapplicable. It does not, however, follow that other belligerent situations fall short of manifesting effective control. Indeed, the Court specifically emphasized its view that military occupation falls


230 See Happold, *supra* n. 190, at 82–83, 88; Ruth and Trilsch, *supra* n. 226, at 171. In much the same way and for much the same reasons it remains important to distinguish between *jus ad bellum* and *jus in bello*.
within those ‘exceptional cases’ in which the Convention would apply extraterritorially. In this sense, then, even this opinion fails to support the Israeli position on the exclusively territorial application of human rights instruments.

It should further be noted in this context that the restrictive approach embraced by the Court in Bankovic was somewhat revised in the Ocalan case, dealing, inter alia, with allegations that Turkey violated the applicant’s human rights during his arrest in Kenya by Turkish security forces. The Court rejected Turkey’s argument that Ocalan was not subject to its jurisdiction while outside its territory:

“The Court considers that the circumstances of the present case are distinguishable from those in the aforementioned Bankovic and Others case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey.”

In deviating from the ‘Convention’s zone of protection’ approach adopted in Bankovic, (Kenya is clearly not part of that zone), the Court seemed to consider the continuing nature of the control exercised by Turkish officials over Ocalan outside and inside Turkish territory. With all due respect, the distinction is hardly convincing. Since the applicant raised separate complaints regarding his treatment while in Kenya as well as in Turkey, it is not clear why jurisdiction over one set of alleged violations should be influenced by another, later, set of alleged violations. Perhaps the Court attributed importance to the intensity of physical control exercised by Turkish officials over Ocalan, which clearly surpassed the level of physical control exercised by NATO forces flying over Belgrade; it did not, however, specifically allude to this possible line of reasoning in its decision.

231 Bankovic, supra n. 48, at para. 60, 70–71. Other exceptions recognized by the Court had been official acts of diplomats abroad and acts taking place on board vessels or aircrafts belonging to the State in question. Ibid., at para. 73.
232 Ocalan v. Turkey, Judgment of 12 March 2003, para. 93 (ECHR). One could perhaps speculate that the fact that Ocalan was a Turkish citizen influenced the willingness of the Court to accept jurisdiction over his extra-territorial detention, although there is nothing in the language of the judgment to confirm this.
It should finally be noted in the context of our discussion of the jurisprudence of the ECHR on the matter, that there were several other cases in which the Convention was applied in an extra-territorial manner, so as to encompass the conduct of state actors abroad. Thus, for instance, in the Issa case, the Court accepted jurisdiction over complaints alleging human rights violations by Turkish troops during a military operation in Northern Iraq.\textsuperscript{233} Further, in a large number of cases the Convention was

\textsuperscript{233} Issa \textit{v.} Turkey, Dec. no. 31821/96, 30 May 2000. The Court in \textit{Bankovic} noted however that jurisdiction was not challenged in Issa – a fact detracting from its precedential value. \textit{Bankovic, supra} n. 48, at para. 81. See also \textit{Xhavara \textit{v.} Italy}, Dec. no. 39473/98, 11 January 2001 (enforcement action in the high seas, in pursuance to an agreement between two member States, is covered by the Convention); \textit{X \textit{v.} Austria}, App. No. 2547/65, 9 Y.B. Eur. Conv. H.R. (1966) 458 (arrest of person by State agents in the territory of foreign country could fall under the Convention).

The case of \textit{Ilascu \textit{v.} Moldova}, Dec. no. 48787/99, 4 July 2001, is particularly interesting as it addresses the responsibility of a State (Moldova) for alleged violations occurring in territory over which it no longer exercises effective control (the Transdniestria region, which seceded \textit{de facto} from Moldova in 1990). It also addresses the level of control required to impute to a State (Russia) effective control over another State's territory. While the Court accepted jurisdiction over the case it refrained from ruling upon the central jurisdictional issues, as it held that they are intimately related to the merits of the case, and will be adjudicated in the merits stage. In its decision of 8 July 2004, the Court held that Moldova failed to adequately pursue its positive obligations to ensure the prevention of violations in its sovereign areas no longer under its effective control and that Russia, by virtue of its decisive influence over the seceding area also incurs responsibility for human rights violations perpetrated there. On the other hand, in \textit{Drozd and Janousek}, the ECHR held that participation of French and Spanish judges in judicial proceedings taking place in Andorra falls outside the ECHR's jurisdiction, as Andorra is not a party to the European HR Convention and since the judges do not sit in Andorra as members of the French or Spanish judiciary, but rather of the Andorran judiciary. \textit{Drozd \textit{v.} France}, Eur. Ct. H.R. (Ser. A) no. 240 (1992). However, we believe that the dissent, arguing that Spain and France must be collectively held responsible for the application of the Convention in Andorra, is far more persuasive. \textit{Ibid.}, Joint Dissenting Opinion (Pettiti, Valticos and Lopes Rocha, approved by Walsh and Spielmann). For support, see \textit{X \textit{v.} Switzerland}, App. nos. 7289/75 and 7349/76, 9 Eur. Comm'n H.R. D. & R. (1977) 57 (Switzerland incurs responsibility for measures made legally applicable in Liechtenstein – then, a non-member country). But \textit{Cf.}, \textit{Hess \textit{v.} U.K.}, App. no. 6231/73, 2 Eur. Comm'n H.R. D. & R. (1975) 72 (the UK does not incur responsibility for alleged violations in prison governed by three of the four occupying forces in Berlin).
applied to state acts that would probably result in violation of human rights in other countries, not parties to the EHR Convention.\textsuperscript{234}

The I/A HR Comm. also had, on a number of occasions, examined the scope of applicability of its human rights instruments. In \textit{Coard} the Commission examined the compliance of US forces with the American Declaration on the Rights of Man (which has no jurisdictional provision)\textsuperscript{235} with relation to a series of events that took place during the invasion of Grenada in 1983. It held that:

"Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state — usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."\textsuperscript{236}

A similar approach was taken by the Commission with regard to U.S.


\textsuperscript{235} American Declaration of the Rights and Duties of Man, 30 April, 1948, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in \textit{Basic Documents Pertaining to Human Rights in the Inter-American System}, OEA/Ser.L/VII.82 doc.6 rev.1 at 17 (1992). In contrast, article 1 of the Inter-American Human Rights Convention adopts a "persons subject to their jurisdiction" standard. American Convention on Human Rights, 22 Nov. 1969, 1144 U.N.T.S. 123. Since the US has not ratified the Convention, the I/A HR Comm'n's jurisdiction over it is limited to the 1948 Declaration.

practices vis-à-vis Haitian 'boat-people',\textsuperscript{237} U.S. operations in Panama,\textsuperscript{238} and attacks by the Surinam government agents against Surinamese exiles living in Holland.\textsuperscript{239}

In sum, there seems to be solid support in the case law of the various international organs responsible for the application of human rights conventions for the proposition that extra-territorial applications of governmental authority, including the exercise of control over occupied territories, should be viewed as falling under the jurisdiction of the state parties to the relevant convention. The number of precedents, their geographical diversity, their invocation of the texts of widely accepted international instruments, and the relative consensus among scholars, all indicate that there is considerable room to argue that the duty to accord human rights protection to all persons subject to a state's jurisdiction – including individuals situated outside its sovereign territory – has become customary international law.

6. The Jurisprudence of the Israeli High Court of Justice on the Application of Human Rights Law in the Occupied Territories

The jurisprudence of the Israeli High Court of Justice (HCJ)\textsuperscript{240} on the question before us is intriguing and defies easy classification. The HCJ has neither espoused nor rejected explicitly the Israeli position. While it has, on numerous occasions, though by no means as a matter of course, referred in its decisions to IHR law (which is potentially applicable under Israeli law, as either customary international law, or as a legitimate source

\textsuperscript{240} Basic Law: Judicature, 1984, art. 15(c), 38 S.H. (1983–1984) 101, 104, provides that the Supreme Court of Israel may also sit as a High Court of Justice and 'when so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of any other court.'
which could aid in the interpretation of domestic law), very few decisions relating to the Occupied Territories have been rendered on the basis of this law. Similarly, there has been little discussion of the weight to be given to IHR law in the interpretation of relevant IHL norms. Any appraisal, thus, of the Court’s stand on the question is a matter of interpretation. This interpretation, in turn, requires that the reading of the relevant judgments’ texts be done in the broader context of understanding the role the Court has carved out for itself in dealing with petitions submitted by the inhabitants of the occupied territories against the government.

There is no denying that the HCJ has positioned itself, at least symbolically, as the gatekeeper of Israeli democracy. It has done so primarily through an expansive exercise of jurisdiction manifested in the virtual elimination of the doctrine of justiciability:

"Indeed, every action can be ‘contained’ within a legal norm, and there is no action regarding which there is no legal norm which ‘contains’ it. There is no ‘legal vacuum’, in which actions are undertaken without the law taking any position on them. The law spans all actions... Every action – including political or policy matters – is contained in the world of law, and a legal norm exists which takes a stand as to whether it is permitted or forbidden".

This legal norm is the standard of 'reasonableness'.

241 Customary law is part of Israeli law, subject to conflicting legislation. Cr.A. 174/54 Shtampfer v. Attorney-General, 10 P.D. 5; Cr. A. 336/61 Eichmann v. Attorney-General, 16 P.D. 2033. However, courts ought to construe legislation in accordance with both customary and treaty law. See e.g., A.C.D. 7048/97 Anonymous Persons v. The Minister of Defense 54(1) P.D. 721; H.C.J. 2599/00 Yated v. Ministry of Education, 56(5) P.D. 834.

242 H.C.J. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 477. An English translation is available in [http://62.90.71.124/files_eng/86/100/009/z01/86009100.z01.HTM], at para. 36.

243 Ibid., at 478–483 (para. 36–46). According to the HCJ’s jurisprudence, a decision is reasonable if it has taken into consideration all the relevant interests and values, and only such interests and values, according an appropriate weight to each. See e.g., H.C.J. 389/90 Dapey Zahav v. Broadcasting Authority, 35(1) P.D. 421, 445–446. This view has attracted considerable criticism rooted in diverse opinions about the proper role of the judiciary in a democracy. See e.g., H.C.J. 1635/90, Zharzhevski v. Prime Minister, 45(1)
It is this self-perception of the Court as an institution the *raison d’etre* of which is to uphold the enforceability of the rule of law,\textsuperscript{244} which sheds light on its initial holding that governmental actions in the Occupied Territories are not exempt from its judicial review.\textsuperscript{245} Indeed, the Court has been quite explicit in rejecting any arguments designed to restrict its judicial review to the territory of Israel proper:

“...[A]nd if one wishes to say that there is no similarity between the State of Israel, which is a law-abiding State, and the area of Judea and Samaria, which is not within the


\textsuperscript{244} Jacques Derrida, “Force of Law: The Mystical Foundation of Authority” (1990) 11 \textit{Cardozo L. Rev.} 921, at 925 (“...the word \textit{enforceability} reminds us that there is no such thing as a law that doesn’t imply in itself, a priori... the possibility of being enforced. There are, to be sure, laws that are not enforced, but there is no law without enforceability”).

\textsuperscript{245} Already in 1967 the then Chief Military Attorney and Legal Adviser to the Defense Ministry (and subsequently, Attorney-General of Israel, and Chief Justice of the Supreme Court), Meir Shamgar, believing that there is a need for a civil authority competent to deal with complaints of the occupied population against the military government, acted to subject the latter to the supervision of the Supreme Court. Shamgar noted that the decision has been “unprecedented in international practice”. See Shamgar, supra n. 17, at 273. It should be noted that the Court explicitly stated that had the Israeli government challenged the Court’s jurisdiction over such matters, it might have prevented further litigation. See H.C.J. 302/72 \textit{Hilu v. Government of Israel}, 27(2) \textit{P.D.} 169. As no such challenge was voiced, the legal review of the IDF’s actions in the occupied territories has become a \textit{fait accompli}. See L. Varshavski, “Institutional Practices and Human Rights: the Hidden and the Evident in the Judgments of the HJC,” (2003) 10 \textit{The Periodical for Political Science and International Relations}. 43, at 47 [in Hebrew]. See generally, Menahem Hofnung, “Human Rights in the Occupied Territories” in Benyamen Noeberger and Ilan Ben-Ami, eds., \textit{Democracy and National Security in Israel} (Tel Aviv, The Open University, 1996) 535–549.
State of Israel and to which different standards apply – I shall respond that this Court applies an equal standard to all. Furthermore, the commander of the area and his subordinates are agents of the State, and regardless of the location of their activity, they are bound to act according to the custom of their State, the custom of a lawful State. This Court will never accept the argument that a member of the military, or any State’s agent, can be exempt from the standards by which the State behaves or from the yoke of the kingdom of its laws. An act or an omission, which – had it occurred in Israel – would have given cause for remedy by this court, would equally give that very same cause even if it had occurred out of Israel, by an act or omission of the State’s agent acting in an official capacity. And this is clear and well known to all" (unofficial translation).246

It is within this analytical framework247 that one should read the text of the judgments in order to shed light on the stand of the Court on the


247 A comprehensive view of the context should further take into account that there are ways other than rendering a judicial decision by which the HCJ may be involved, and that these mostly hidden ways may, in practice, contribute to the protection of human rights in the occupied territories to an extent far greater than the one disclosed in the decisions: the Court facilitates the reaching of agreements between governmental authorities and the petitioners and indeed serves as a communication link when most other such avenues do not exist. This role explains why many Palestinians continue to resort to the Court despite the fact that very few of their appeals are accepted as a matter of official record as, in this manner, the Court is able to satisfy the petitioners without exposing itself to public and political wrath. Yoav Dotan, “Judicial Rhetoric, Government Lawyers and Human Rights: the Case of the Israeli High Court of Justice During the Intifada” (1999) 33 Law and Society Rev. 319; Varshavski, supra n. 245, at 50–51. A relatively recent example may be found in the appeal against the IDF’s practice of using Palestinians as human shields. The IDF’s response to the appeal contained a commitment to cease the contested policy, thereby preempting a potential judicial order to do so. See H.C.J. 3799/02 Adallah v. Chief of Staff; Petition submitted on 5 May 2002, available at [http://www.acri.org.il/hebrew-acri/engine/story.asp?id=429] [in Hebrew and English]. In another recent example the petitioners asked the Court to
applicability of IHR law in the occupied territories, as the texts themselves fail to reveal a consistent method. Instead, the following approaches may be discerned in decisions where the subject matter revolves around the denial of human rights in the territories:

(a) There is no reference to either IHR or IHL but rather an unequivocal espousal of the position of the military on the basis of undisclosed evidence. This approach has been often taken in situations where the appeal relates to on-going military actions or security investigations.248

(b) The appeal is decided in reference to the relevant norms of IHL but without any reference to IHR law.249

(c) The decision refers to human rights, as they exist in abstracto250 or in Israeli law (with reference to Israeli administrative law; and/or Basic...
Law: Human Dignity and Liberty; and/or the fundamental principles of a Jewish and democratic State). Often, IHL norms – but not IHR law – would be referred to as well. 251

(d) The decision refers to IHR norms and relevant jurisprudence and literature only to decree their irrelevance or inapplicability to the case at hand. 252

(e) The decision refers to IHR law (or to human rights included in IHL) not as an independent normative source but rather the reference is made to support another normative source of human rights within the Israeli legal system. It is interesting to note that this method is often employed when the Court actually overrules the position of the government. 253

251 E.g., H.C.J. 3451/02 Almadani. v. The Minister of Defense, 56(3) P.D. 30 (The petition concerned the supply of water and food to Palestinian civilians who were in the Church of the Nativity during operation Defensive Shield. The petition was rejected in reference to IHL and to the values of Israel as a Jewish and democratic state); H.C.J. 2936/02 Physicians for Human Rights v. The IDF Commander in the West Bank, 56(3) P.D. 3 (The petition challenged the IDF’s treatment of medical personnel during operation Defensive Shield and the Court stated that the IDF is bound by IHL, as is required by international law as well as by the values of the State as a Jewish and democratic state); Mmalmon, supra n. 246 (The appeal concerned the confiscation of private property in order to build roads, and the Court, having observed that “every Israeli soldier carries in his backpack the norms of customary public international law which deal with the laws of war as well as the basic norms of the Israeli administrative law” (unofficial translation); Ibid., at 810; proceeded to apply the Hague Regulations and reject the petition).

252 E.g., H.C.J. 13/86 Shahin v. The IDF Commander of the West Bank, 41(1) P.D. 197 (The petition concerned, inter-alia, the right to marry and create a family. The petitioners relied on an opinion by Prof. Dinah Shelton who stated that these rights are recognized under international human rights law. Having noted that the supporting opinion “almost does not attempt to deal with the legal question – which carries the decisive weight in the circumstances – how is her thesis influenced by the fact that at issue is an area held under belligerent occupation” (unofficial translation); Ibid., at 205), J. Shamgar does not deal with that question either. Instead, he assumes for the purposes of the discussion that IHR documents are applicable, refers to the UDHR, the ICCPR as well as to other IHR instruments only to decide that they are irrelevant to the case at hand. In H.C.J. 591/88 Taha. v. The Minister of Defense, 45(2) P.D. 45, Levin J., rejected the petitioners reliance on the UDHR to challenge the order of the military commander imposing collective responsibility, stating that the UDHR reflects neither customary nor conventional international law.

253 E.g., H.C.J. 5100/94 Public Committee Against Torture in Israel v. The Government of
The normative framework of the decision includes explicit reference to IHR law, to normative sources of human rights within the Israeli legal system, as well as to IHL, but the decision is normally rendered exclusively or predominantly on the basis of the Court's interpretation of the latter.  

Israel, 53(4) P.D. 817. This case concerned the interrogation methods used by the GSS, and the Court noting that human dignity includes the dignity of a person subject to interrogation, and that the use of brutal or inhuman means of interrogation is forbidden under Israeli law, proceeded to mention that “this conclusion is in accordance with conventional international law – to which Israel is a party – which forbids the use of torture, cruel or inhuman treatment or degrading treatment”. Interestingly, reference in this instance was made to literature (Nigel S. Rodley, The Treatment of Prisoners Under International Law (Paris, Claredon Press, 1987) 63; M. Evans and R. Morgan, Preventing Torture (Oxford, 1998) 61) but no explicit reference to the CAT or to other relevant IHR instruments was provided. Ibid., at para. 23. See also Anonymous, supra n. 241, in which the Court accepted the petitioner's claim that the holding of people as bargaining chips is illegal. Here too the prohibition was derived at from the application of Israeli detention Law, interpreted in the light of the Basic Law: Human Dignity and Liberty, and the scant reference to international law in general and to the Convention Against the Taking of Hostages (International Convention Against the Taking of Hostages, 18 Dec. 1979, 1316 U.N.T.S. 205) and IHL in particular, read as follows: “…The holding of persons as 'hostages' – and this term includes the holding of persons as 'bargaining chips' – is forbidden by international law... Indeed, I am willing to assume, without deciding on the issue – that there is no such prohibition under customary international law. I am further willing to assume – without deciding on the matter – that the conventional prohibition against the taking of hostages does not bind the State of Israel in the domestic law of the state in the absence of an incorporating legislation. Be that as it may, there is a presumption that the purpose of a law is, inter alia, to realize the provisions of international law and not to contradict them...there is a ‘presumption of compatibility’ between public international law and the domestic law… the application of the presumption in the circumstances of the case, strengthen the tendency detected in reference to the objective purpose of the law” (unofficial translation). Ibid., at para. 20. It should be noted however that both cases pertained to individuals detained in Israel.

254 In H.C.J 7015, 7019/02 Ajouri v. The IDF Commander in the West Bank, 56(6) P.D. 352 (Barak, J. having established that IHR law recognizes distinctions between the displacement of a person due to combat activities and displacement occasioned by natural disaster, proceeds to state that in the former case the applicable law is IHL). An English version of the judgment is available at [http://62.90.71.124/files_eng/ 02/150/070/0150/0270150.a15.HTM]. Two additional recent cases deal with conditions in detention centers where Palestinian suspects were held: The first case – H.C.J. 3278/02 The Center for the Defense of the Individual v. The IDF Commander in the West Bank, 57(1) P.D. 385, dealt with the conditions of detention of thousands of Palestinians
This last approach, advanced in recent years mainly by Chief Justice Barak, supports, at least in principle, the position that IHR law and IHL are not mutually exclusive and that both apply to the Occupied Territories. Indeed, the structure of Barak’s judicial narrative seems to imply that insofar as the Occupied Territories are concerned, IHL is *lex specialis* which IHR law complements. The recent *Mar'ab* case\(^{255}\) aptly demonstrates this point: in this case, Barak invalidated part of a military ordinance which authorized the detention of Palestinian suspects for 12 to 18 days without judicial review. Recognizing the failure of Geneva IV to specifically regulate the question, Barak relied extensively upon IHR norms – article 9 of the ICCPR, an HRC General Comment,\(^{256}\) ECHR in provisional facilities and in the ‘Ofer’ detention center in the West Bank. In rejecting the appeal the Court (Barak, J.,) having observed that the Court does not have to decide whether or not Basic Law: Human Dignity and Liberty applies, as it is sufficient that Israeli administrative law applies, stated that the starting point for the discussion is the balancing point between the liberty of the individual and the security of the collective, citing the relevant provisions of the ICCPR and noting their customary status. He then proceeded to state: “[i]n addition to these principles, we must consider the principles and regulations set forth in the Fourth Geneva Convention” (*ibid.*, at para. 25). an English version of the judgment is available at [http://62.90.71.124/Files_ENG/02/780/032/a06/02032780.a06.HTM]. In the second cases – *H.C.J. 5591/02 Yassin v. Ben-David, the Military Commander of Ketziot Detention Center, 57(1) P.D. 403* the Court reviewed the conditions of detention of Palestinian detainees in the Ketziot detention center. Again, Barak J., noting that “[t]he detainees were duly deprived of their liberty. They were not stripped of their humanity” (*ibid.*, para. 8), detailed the applicable normative structure: the Basic Law: Human Dignity and Liberty (note that whether or not the Basic Law applies was not an issue in this case, as ‘Ketziot’, unlike ‘Ofer’ is located within the Green Line); the values of Israel as a Jewish and democratic state; the ICCPR. In this context, Barak observed: “Israel is not an isolated island. She is a member of an international system, which has provided for standards regarding detention conditions. The most significant of these may be found in article 10(1) of the International Covenant on Civil and Political Rights (1966)” (*ibid.*, at para. 11) and, Geneva IV (*ibid.*, para. 12). He then proceeded to apply the latter’s provisions and rejected the appeal. An English version of the judgment is available at [http://62.90.71.124/Files_ENG/02/910/055/a03/02055910.a03.HTM]. It should be noted that in both the ‘Ofer’ and ‘Ketziot’ cases the Court criticized the initial detention conditions in the camps and characterized them as unlawful. It also required some improvements in the current conditions of detention.

\(^{255}\) *H.C.J. 3239/02 Mar'ab v. The IDF Commander in Judea and Samaria* (not yet published).

\(^{256}\) Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), U.N. Doc. HRI\l\GEN\l\Rev.1 at 8 (1994).
case law,\textsuperscript{257} the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment\textsuperscript{258} and numerous international commentators\textsuperscript{259}—in order to reach the conclusion that the challenged measure was unlawful under international law, and thus invalid.

Given the immense influence of Chief Justice Barak on the jurisprudence of the Court, given further his consistent liberal-democratic approach to the role of the judiciary in a democracy\textsuperscript{260} and, consequential position that human rights do not disappear in critical situations but have to be balanced against competing interests,\textsuperscript{261} it may be concluded that the Israeli Supreme Court’s response to the question at hand differs from that of the Israeli government. Indeed, it may be concluded from the above that the concept of human rights, though in most cases not necessarily the direct application of IHR law as a normative source, is present in decisions pertaining to petitions by the inhabitants of the occupied territories. There is, however, a gap between a principled position and concrete specific decisions. The analysis of the judgments in which

\begin{itemize}
  \item \textsuperscript{259} Mar’ab, supra n. 255, at para. 27 (Citing Rodley, Jacobs, White and others).
  \item \textsuperscript{260} See Aharon Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116 Harvard L. Rev. 16.
  \item \textsuperscript{261} See e.g. \textit{ibid.}, at 153–55: “Democratic nations should conduct the struggle against terrorism with a proper balance between two conflicting values and principles. On the one hand, we must consider the values and principles relating to the security of the state and its citizens. Human rights are not a stage for national destruction... But on the other hand, we must consider the values and principles relating to human dignity and freedom. National security cannot justify undermining human rights in every case and under all circumstances... Any balance that is struck between security and freedom will impose certain limitations on both”. See also H.C.J. 7015/02 Ajuri \textit{v.} IDF Commander in the West Bank, supra 254. “A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle”. \textit{Ibid.}, at para. 41 (Barak J.).
\end{itemize}
the normative framework for the decision included IHR norms, clarifies that they had been given little weight in actual decisions, and that once the narrative has moved from the general exposition of the normative framework to the specific law applicable to the case, IHR norms have been, as a rule, conspicuous in their absence. It is their application that would bridge the gap between general rhetoric and concrete decisions.

D. Effective Control in the Occupied Territories

The third and final element of the Israeli objection to the application in the Occupied Territories of the human rights conventions to which it is party relies on the effect of the creation of the PA and the transfer of authority thereto, thereby, arguably, depriving Israel of effective control over the area.262 Our above delineated position, that effective control and direct effect are the predominant factors determining the scope of application of human rights instruments, read in the light of the Tsemel doctrine,263 suggests that the Israeli position may have merit as a matter of principle: areas no longer subject to any form of Israeli control should generally be excluded from Israel's international responsibilities under the conventions, even if these areas were subject by law to Israel's sovereignty.264 In areas where Israel actually exercises effective control, however, notwithstanding the transfer of authority to the PA, the conventions continue to apply.265

The specific question whether Israel has or does not have effective control over this or that piece of territory is one of fact, which exceeds the scope of the present paper. Given our position that Israel incurs responsibility over all official acts directly affecting the Palestinian population in the West Bank and the Gaza Strip, whether placed under Israel's or the PA's nominal or effective control, the importance of the

262 See supra Part II(4).
263 See supra text accompanying n. 162–163.
265 See Benvenisti, supra n. 163, at 312.
question is diminished. This position is consistent with article 6 of Geneva IV, which mandates that after one year from the date of occupation, the occupying force would only incur responsibility for powers actually exercised by it. This provision derived from a belief that after a year the occupying force would gradually transfer power to local authorities, while nevertheless remaining internationally responsible for the implementation of the Convention, and, in particular, for measures it applies in the occupied territory.266

Two observations may be offered in this context. In the Ajuri case,267 the Supreme Court of the State of Israel seems to have accepted, with the implicit encouragement of the Israeli authorities, the position that the Gaza Strip is still governed by the humanitarian provisions of Geneva IV, which Israel has undertaken to respect. Hence, transfer of Palestinians from the West Bank to the Gaza Strip could be viewed as relocation of residence within the same occupied territory. This of course strengthens the argument that even areas administered by the PA can be regarded, for some purposes, as falling under Israel’s effective control.

In addition, the prolonged nature of the Israeli occupation and the ensuing territorial, economic, social, political and other links between Israel and the Palestinians in the Occupied Territories, also support the attribution of human rights responsibilities to Israel. This is so because the drafters of Geneva IV never foresaw such a long-term occupation, and, having sought to maintain the status quo, imposed only limited duties upon the occupant. The Convention, therefore, does not meet the needs of the population and additional protection and guarantees are required. IHR law provides these.268 In other words, the prolongation of the occupation usually supports the imposition of more severe restrictions on the occupant’s power and the introduction of more human rights guarantees designed to benefit the local population.269

266 Geneva IV, art. 47. For discussion of Geneva IV, art. 6, see Roberts, supra n. 17, at 55–57.
267 Ajuri, supra n. 254.
268 Roberts, supra n. 17, at 71.
269 The Commentary to the Geneva IV states: “...if the Occupying Power is victorious, the occupation may last more than a year, but as hostilities have ceased, stringent measures against the civilian population will no longer be justified.” Pictet, supra n. 99, at 63.
In the 1998 Concluding Observations issued by the ESCR Committee, the latter seemed to have embraced a variation of this pragmatic approach: “The Committee takes note of the statement by State party’s representatives that with respect to the Covenant’s applicability in the occupied territories, Israel accepts direct responsibility in some areas covered by the Covenant, indirect responsibility in other areas and overall significant legal responsibility across the board. This conforms to the Committee’s view that the Covenant applies to all areas where Israel maintains geographical, functional or personal jurisdiction.”270 While Israel’s written response to the list of issues raised by the Committee is generally consistent with this approach, as it declared that it remained committed to respect international human rights standards in exercising the few remaining powers it has vis-à-vis residents of the Occupied Territories,271 Israel later clarified its position and issued a statement that alleged that it was merely willing to provide, on a pragmatic basis, information to the Committee on the situation in the West Bank and Gaza Strip. This it had arguably done without prejudicing its legal objections regarding the scope of applicability of the Covenant.272

Finally, a related issue involves the scope of human rights obligations of the PA. It is generally acceptable that non-State actors, especially actors with quasi-State attributes such as national liberation movements, can assume international obligations, including in the area of human rights.273 Hence, the limited reference in the Oslo Accords to the human rights


duties of the parties\textsuperscript{274} would create valid legal obligations binding upon the PA.\textsuperscript{275} In the same vein, there is room for argument that international customary law introduces human rights obligations for both States and non-State entities.\textsuperscript{276}

It is interesting to note that there are weighty precedents, which suggest that transfer of control does not interrupt the application of human rights conventions to the transferred areas. In the case of Macau – an area transferred from Portuguese administration to Chinese sovereignty – the HRC held that:

"The Committee, moreover, wishes to reiterate its long-standing position that human rights treaties devolve with territory, and that States continue to be bound by the obligations under the Covenant entered into by the Predecessor State. Once the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, they cannot be stripped of that protection on account of a change in sovereignty."\textsuperscript{277}

This could mean that once a Palestinian State is established, a strong argument could be made that Palestinians should continue to enjoy the protection of human rights treaties to which Israel is party, even if the new State chooses not to ratify them. Until the Palestinians become independent and able to assume obligations under the international human rights conventions, however, there are strong policy considerations, which support the continued responsibility of Israel for these individuals,

\textsuperscript{274} See \textit{supra} n. 63.
\textsuperscript{275} Benvenisti, \textit{supra} n. 163, at 314–316.
limited only by the degree of effective control exercised by Israel. Such an approach would clearly minimize vacuums in the conventions' scope of protection.

IV. **Concluding Observations: The Interplay between International Human Rights and Humanitarian Law**

The above analysis suggests that an occupying power bears responsibility for the human rights of the inhabitants of occupied territories under both IHL and IHR law, subject to its potential or actual effective control. The emergence of a new theoretical paradigm, driven by human rights consciousness and resting on the principle of the universality of human rights supports this conclusion. This principle, in turn, informs the interpretation of the jurisdictional clauses of the major human rights treaties, substituting the test of effective control for the concept of territory, and reversing the presumption in favor of the territorial application of international treaties, insofar as human rights treaties are concerned. The theoretical, legal and policy arguments in favor of the application of human rights norms to occupied territories are further supported by the practice and jurisprudence of international bodies and, to some extent, by the recent jurisprudence of the Israeli Supreme Court. Indeed, the application of IHR law to the areas over which Israel exercises effective control in the West Bank and the Gaza Strip is particularly required, as IHL, having envisioned a temporary occupation, is clearly insufficient in the circumstances of an occupation of such an extended duration.

It follows that the Israeli opposition to the co-application of both regimes is anachronistic to say the least. When this position, which

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278 See supra Part III (2).
279 See supra Part III(3)(a)-(d).
280 See supra text accompanying nn. 78–95.
281 See supra Part III(3)(e) and supra text accompanying fn. 142–149.
282 See supra Part III(3)(f).
283 See supra Part III(4).
284 See supra text accompanying fn. 268–269.
285 See supra Part II.
supposedly leaves IHL as the only applicable legal framework, is coupled with Israel’s reluctance to admit the applicability of Geneva IV,286 and with its view regarding the responsibility of the PA for human rights in the post-Oslo period,287 it becomes even less defensible: it is evasive, it lacks good faith and it generates a legal lacuna, which the HCJ has yet to fill adequately.288

Our position, maintaining that IHL and IHR law co-exist on a continuum, rather than across a dividing line, regards violence as an aspect of, rather than an exception to, the normal course of international life. Accordingly, it emphasizes the principle of humanity that lies at the core of the laws of war289, the law of occupation and human rights law,290 and points to their concurrent development. Indeed, there is no conceptual difference between the IHL and IHR law, at least as they stand today, as both regimes are designed to promote human dignity and physical integrity and, by the same token to minimize human suffering. This is most apparent in the rapidly evolving rules of non-international armed conflicts that are not aimed at regulating the relationship between states,

286 See supra text-accompanying n. 17.
287 See supra Part II(4).
288 See supra Part III(f). See also Kathleen A.Cavanaugh, “Theoretical and International Framework: Selective Justice, the Case of Israel and the Occupied Territories” (2003) 26 Fordham Int. L. J. 934.
289 The term “laws of war” often referred to as “The Hague Law” pertains to a series of conventions from 1868 to 1907. See e.g., Declaration of St. Petersburg, 29 Nov. 1968, reprinted in 1 The Law of War: Documented History (Leon Friedman ed., 1972) 192; Hague Convention No. II with Respect to the Laws and Customs of War on Land (and Annexed Regulations), 29 July 1899, 32 Stat. 1803, T.S. No. 403; Hague Convention No. III Relative to the Opening of Hostilities, 18 Oct. 1907, 36 Stat. 2259, T.S. No. 538; Hague IV. See Jean Pictet, Developments and Principles of International Law (Dordecht, M. Nijhoff, 1985) 49–58; Frits Kalshoven and L. Zeveld, Constraints on the Waging of War (Geneva: ICRC, 3rd, 2001) 19–25. This law, as distinct from the Law of Geneva, concerns itself primarily with the regulation of belligerent conduct during warfare. Currently, the Hague and the Geneva Law are considered inseparable, thus forming “one single complex system, known today as international humanitarian law” (Nuclear Weapons, supra n. 59 at 256), rendering the distinction between them obsolete especially in view of their integration into Protocol I. Still, the distinction is warranted in some cases where it is necessary to identify the different historical origin of the norm.
290 Furund, supra n. 76, at para. 183; Delalic, supra n. 135, at para. 200; Abella, supra n. 148, at para. 158; Meron, supra n. 26, at 266.
but rather, between the state and its inhabitants. The criminalization of human rights atrocities committed during armed conflicts and entailing personal accountability further attests to the blurring of the boundaries, and the growing *rapprochement* between these fields of law.

Our approach does not deny that a state of armed conflict or of occupation poses special difficulties that IHR law is not always adequately equipped to handle. The application of many IHR norms assumes peacetime conditions and a self-governing social framework. Hence, armed conflicts and situations of occupation indeed entail significant challenges. For example, the feasibility of implementing political rights, such as the right to take part in public life or the right to assembly (including the right to protest) in occupied territories is unclear. Similarly, the legitimacy of introducing IHR law in occupied territories in order to reform local traditions and practices (such as discrimination against women) might be questioned.291 Finally, there are numerous difficulties relating to the methods by which occupying forces are required to fund public services underlying many economic and social rights in occupied territories, while respecting, at the same time, IHL limits on taxing the local population in occupied territories.292

However, we maintain that inadequacy is not tantamount to inapplicability. Indeed, the ICJ affirmed that the application of human rights in situations of conflict is not suspended even in the most atypical of situations – the use of nuclear weapons.293 The special challenges of armed conflict and occupation should not lead to disavowal of the object and purpose of IHR law. Instead, it should lead to the development of creative solutions, respective, as much as possible, of the norms of IHR.294


293 *Nuclear Weapons, supra* n. 59, at 240.

294 For example, concerns regarding the legitimacy of imposing IHR law on the local population could be mitigated through consultations with representatives of the local population related to the method of introducing IHR law. See e.g., Playfair, *supra* n. 291, at 223. Similarly, the extent of the obligation of the occupier to invest resources in
In accordance with these general policy considerations, we have come to the conclusion that while the law of war and humanitarian law provide _lex specialis_ in situations of armed conflict and occupation – the shortcoming of one regime could and should be compensated by the other. While a comprehensive survey of the implications of our conclusion is beyond the scope of the present article, we find it necessary to conclude the discussion with a few observations demonstrating its theoretical and practical importance. Generally speaking, the confluence of the two regimes encompasses four modalities: (a) a situation of a direct conflict between IHL norms and IHR law; (b) a situation that is unregulated, or sparsely regulated, by either IHL or IHR; (c) a situation where IHL influences the interpretation of IHR; and (d) a situation where IHR influences the interpretation of IHL. The remaining part of this section elaborates briefly on each on these modalities.

(A) In cases of a direct conflict between the two regimes, IHL normally ought to prevail, unless an explicit contrary intent can be drawn from a later-in-time instrument. Thus, for instance, the application of IHL alone would suffice in order to conclude that the targeting of combatants is permissible, IHR norms pertaining to the right to life notwithstanding. Similarly, internment or assigned residence – both safety measures that the occupying power is authorized to take under certain conditions specified in Geneva IV – seem to conflict with the human right to freedom of movement. Such a situation of conflict, however, is bound to be extremely rare. Instead, in most situations both regimes could apply

the occupied territories should be read in the light of the relative nature of economic and social rights. ICESCR, art. 2(1).

295 See also Meron _supra_ n. 26; Walter Kalin “The Struggle against Torture”(1998) 324 _Int. Rev. Red Cross_, 433, 434; Peterson, _supra_ n. 29, at 33–43; Benvenisti, _supra_ n. 109, at 32.


297 Geneva IV, art. 78(1); UDHR, art. 13(1); ICCPR, art. 12(1).

298 A useful analogy can be found in domestic law dealing with conflicting norms of two or more jurisdictions. US courts have adopted a very narrow definition of what constitutes such conflicts. _Hartford Fire Insurance Co. v. California_, 509 U.S. 764, 798–799 (1993)(conflict arises only when conduct mandated by one jurisdiction is prohibited by the other).
concurrently and their contents ought to be harmonized. As discussed above, this seems to be the position taken by the Vienna Convention on the Law of Treaties.\textsuperscript{299}

(B) In cases that are either unregulated or sparsely regulated by IHL, IHR law ought to apply and vice versa. Further, the need for inter-regime harmony supports the construction of gaps in regulation by IHL or IHR law as \textit{lacunae} and not as negative arrangements. This approach thus emphasizes the complementary nature of the two legal regimes. For instance, IHR law regulates only sparsely conditions of detainment in detention or POW camps. IHL fills this gap and provides extensive regulation of the matter.\textsuperscript{300} At the same time, most IHL protections do not extend to some individuals (e.g., a State’s own citizens) and in such situations IHR norms should apply and provide the individuals with a roughly equivalent level of protection. Similarly, it could also be maintained that since Geneva IV hardly addresses educational services in the occupied territories, the gaps in the regime should be filled by norms found in article 13-14 of the ICESCR.

It is the same need to reduce conflicts and lacunae between IHR law and IHL that warrants interpretative cross-influence between the two regimes, as detailed in (C) and (D) below.

(C) Cases where IHL influences the interpretation of IHR are bound do be quite common, given the dominance of the former in situations of belligerent occupation. Thus, for instance, key human rights, such as the right to life (comprising a ban on arbitrary deprivation of life) and the freedom from arbitrary arrest ought to be construed in light of the power of the occupant to execute certain offenders and to detain suspects (sometimes, even \textit{incommunicado}).\textsuperscript{301} In the same vein, key concepts such

\textsuperscript{299} See especially Vienna Convention, art. 31(3)(c). See also discussion \textit{supra} text accompanying nn. 139–140.
\textsuperscript{300} See e.g., Geneva IV, art. 83–141.
\textsuperscript{301} See e.g., Geneva IV, art. 5, 68, 78. For discussion of the \textit{Nuclear Weapons} case which supports our approach, see \textit{supra} text accompanying nn. 143–149. It should be noted that Frowein argues that the harmonization approach does not apply with regard to rights drafted in absolute terms, such as the prohibitions against torture and slavery. Frowein, \textit{supra} n. 180, at 12. To the extent that these rights are non-derogable, they will indeed continue to fully apply in situations of armed conflict (or belligerent occupation). However, IHL would still assist in interpreting what constitutes ‘torture’ or ‘slavery’.
as ‘cruel, inhuman and degrading treatment or punishment’ and ‘slavery’ should be construed in a manner compatible with IHL, so that acceptable practices under one regime would be deemed lawful under the other regime (e.g., a proportional and discriminatory use of force would not normally be viewed as ‘cruel, inhuman or degrading’ and mandatory conscription would not be viewed as ‘slavery’). Explicit limitation clauses found in human rights instruments (such as article 12(3) of the ICCPR and article 4 of the ICESCR) should also be applied in line with IHL. Hence, legitimate restrictions upon freedom of movement under IHL should not normally be viewed as an unlawful restriction under IHR law. Finally, the ability of State parties to invoke article 4 of the ICCPR (the derogation clause) is influenced by the fact that IHL applies, i.e., that there exists an armed conflict. Restrictions upon the actual exercise of the derogation clause are further considerably influenced by IHL, as rights protected under IHL are always non-derogable.

(D) Situations where IHR influences the interpretation of IHL norms provide the last modality, and, we submit, one the importance of which increases in direct proportion to the length of the occupation. Thus, for instance, due process guarantees established in article 14 of the ICCPR should inform us of the contents of the right to ‘fair and regular trial’ under Geneva IV and the prohibition against torture under Geneva law should be construed in the light of the CAT and other relevant IHR norms. Similarly, the humanitarian obligations to provide medical facilitiesshould be construed in light of the right to health under IHR law.

302 See e.g., Geneva IV, art. 35, 48, 49.
304 See General Comment 29, supra n. 106, at para. 3, 9, 11, 16.
305 See Geneva IV, art. 71–75. A more comprehensive list of guarantees is found under Protocol I, art. 75.
306 Furundzija, supra n. 76, at para. 143–163.
307 See e.g., Geneva IV, art. 5, 147. See also Geneva III, art. 130.
right to equality\textsuperscript{309} should also be used to determine the scope of the prohibition against discrimination in IHL.

An important practical outcome of our position is that it supports the exercise of jurisdiction by an international body monitoring compliance with IHR treaty standards over the application of IHR law in situations of occupation. In the Israeli context, this would enable the HRC and other UN treaty and Charter bodies (such as the ESCR Committee and the Human Rights Commission) to periodically review Israeli practices in the Occupied Territories. Although none of these bodies are endowed with competence to issue binding decisions, their cumulative practice influences, to some degree, public opinion outside and inside Israel. Removal of jurisdictional objections to the involvement of international bodies in monitoring the situation in the Occupied Territories could legitimize their work and increase the ‘compliance pull’ of their decisions.\textsuperscript{310}

The Israeli policy of targeted killings – a policy the legality of which currently awaits determination by the HCJ – illustrates the various implications of the co-application of IHL and IHR law.\textsuperscript{311} In some instances, the permissibility or impermissibility of the action is fairly clear-cut as only IHL (and, at times, international criminal law) is applicable. Thus, it may be concluded that the targeting of combatants and of civilians who take a direct part in the hostilities during combat is permissible\textsuperscript{312}; that the targeting of non-combatants who do not take part in hostilities is forbidden\textsuperscript{313} and indeed amounts to a criminal act under international

\begin{itemize}
\item \textsuperscript{309} See e.g., Human Rights Committee, General Comment 18, Non-Discrimination (1989), U.N. Doc. HRI\GEN\1\Rev.1 at 26 (1994).
\item \textsuperscript{311} See supra n. 73. For a comprehensive discussion of the legality of the targeted killings see Ben-Naftali and Michaeli, \textit{supra} n. 17.
\item \textsuperscript{312} This situation regarding both categories is regulated entirely by IHL. For the right to target combatants, see \textit{supra} n. 297. The test applicable to the determination of whether or not a civilian’s action amount to “the taking of a direct part in the hostilities” (Protocol I, art. 51(3)) is whether his activities, “by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces” and whether they present an immediate threat to the adversary. See Pillaud, \textit{supra} n. 297, at 619.
\item \textsuperscript{313} This conclusion emanates from the principle of distinction that informs IHL. See e.g., Geneva I-IV, art. 3; Protocol I, art. 48; Protocol II, art. 4, 13.
\end{itemize}
law, and that the targeting of non-combatants who took part in the hostilities, but are no longer thus engaged, that is, killing which is undertaken for past deeds, is forbidden and entails criminal responsibility.

But is it permissible, for instance, to target combatants in situations other than combat? How is proportionality to be determined in instances of targeted killing? Such questions, among others, are open to interpretation because the applicable legal texts fail to provide a definite answer and do not cohere on any of them: while the laws of war are often permissive, human rights law is restrictive and the Fourth Geneva Convention is silent. The application of our approach suggests the following considerations in responding to the first question: as even combatants are entitled to right to life protections, they are only legitimate targets if all reasonable means to apprehend them fail. This deviates from the norm of IHL, which permits the targeting of enemy combatants throughout the duration of hostilities, without requiring exhaustion of alternatives. Pre-emptive targeting of individuals who pose an immediate threat to Israel’s security should be an exceptional measure, not a policy. Further, consistent with the targeted person’s due process rights (which do not exist, as a rule, under IHL in combat circumstances), Israel is under the heaviest of burdens to substantiate its claim of a person’s culpability. With no judicial oversight over the decision-making process, the individual is deprived of all means of protecting himself and of defending his innocence. This heavy burden should further restrict Israel’s ability to engage in targeted killings, thus considerably minimizing their occurrence. The possibility of targeting a person could therefore be limited to incidents where there is an extremely high probability that the individual poses a significant risk to Israel’s


315 This conclusion too emanates from the principle of distinction: The exception which allows for the targeting of civilians who take part in hostilities during combat should be narrowly construed: its rationale is that during combat they pose a threat to the adverse party. So long as that threat is neither imminent nor severe, a civilian is not a legitimate target and alternative means to prevent the threat from materializing should be pursued. See Fleck, supra n. 39, at 211.

316 As they are considered civilians, the rules cited in supra n. 315 apply.
security and no other recourse is materially feasible.\textsuperscript{317} Similarly, in deliberating the issue of proportionality in the context of targeted killings (which comprises an implicit, and sometime explicit part of limitation clauses found in IHR treaties),\textsuperscript{318} our approach would reinforce the principle of proportionality found under IHL and require that targeted killing actions that entail risks to civilians take into consideration the responsibility Israel assumes over their lives and property. In the light of the fact that the Palestinian territories are densely populated, and that most operations can only take place within these territories, only exceptional circumstances will enable the execution of such operations that have little harmful effects. The same interpretative construction should also be applied when considering the methods employed in these operations.\textsuperscript{319}

The issue of targeted killings is but one case, albeit a major one in terms of its political implications, where the HCJ could apply both IHL and IHR in a manner that pours coherent content into this composite legal framework. The Court’s preliminary request, in this case, that the parties provide it with their respective views on the applicable laws, signals that it is well aware that the position of Israel that the only relevant law is “the law of armed conflict”, is not self-evident.\textsuperscript{320} This article is designed to encourage it to hold that this position has no merits and, consequently, to determine each case on the basis of the co-application of both humanitarian and human rights regimes. Such a flexible application, as has been demonstrated, is neither oblivious to the military considerations of the occupying power nor to the human rights of the occupied population. On the contrary, it is an attempt to translate the required balance between the two into concrete decisions in a manner that takes into consideration

\textsuperscript{317} It should be noted that a failure to follow these guidelines does not necessarily amount to a criminal act, as the customary laws of war permit the targeting of combatants without imposing such conditions once the requirements of necessity and proportionality are met. It could, however, entail Israel’s international responsibility. See Ben-Naftali & Michaeli, \textit{supra} n. 17 at 290.

\textsuperscript{318} See e.g., ICCPR, art. (1); HRC, General Comment 29, \textit{supra} n. 106, at para. 4.

\textsuperscript{319} See Ben-Naftali and Michaeli, \textit{supra} n. 17 at 187–292. Note that indiscriminate attacks against protected persons fall both under article 8(2)(c)(1) and article 8(2)(e)(i) of the ICC statute.

\textsuperscript{320} See \textit{supra} n. 73.
the specificities of the Israeli occupation of the West Bank and the Gaza Strip, the obligations of Israel under the international legal system, and indeed the nature of the democratic discourse within the state.

POSTSCRIPT

I. General

On 9 July 2004, the ICJ rendered its Advisory Opinion on the Legal Consequences of a Wall in the Occupied Palestinian Territory. The Opinion contains, inter-alia, a determination regarding the co-application of IHL and IHR law in the occupied territory of the West Bank, including East Jerusalem. This determination confirms the main thesis advanced in this article. It does so, however, in a manner that is problematic and which fails to exhaust the creative potential of the confluence of both regimes. This postscript summarizes the position of the Court on this issue, and proceeds to offer a brief critical assessment thereof.

II. An Overview of the Court’s Opinion as it Relates to the Co-Application of IHL and IHR Law in the Occupied Territories

In order to respond to the question set forth in General Assembly Resolution ES-10/14, the Court had first to determine the status of the territories. Having concluded that the territories under consideration

321 Legal Consequences of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. (forthcoming) (Hereinafter: OPT Wall).
322 The article was written during the summer of 2003 and accepted for publication some 9 months prior to the date of the delivery of the Advisory Opinion.
323 The critical review of the Opinion is by no means exhaustive. Indeed, one of the next Israel Law Review issues will include comprehensive reviews of the Opinion written by many Israel international law scholars.
325 OPT Wall, at paras. 70–78.
have remained occupied territories and that Israel has continued to have the status of an occupying Power since 1967,\textsuperscript{326} it proceeded first, to determine the normative framework, that is, the rules and principles of international law which are relevant in assessing the legality of the construction of the wall;\textsuperscript{327} second, to identify the relevant provisions comprising this normative framework; and, finally, to apply them in order to ascertain whether the construction of the wall has violated the rules and principles found relevant.\textsuperscript{328}

A. The Normative Framework

It is in the context of outlining the normative framework for the determination of the question that the Court has ruled on “the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law”.\textsuperscript{329} Relating first to IHL, the Court affirmed the applicability of the Hague Regulations\textsuperscript{330} and of the Fourth Geneva Convention.\textsuperscript{331} In the context of the latter, the Court presented, and rejected, the Israeli argument regarding its non-applicability \textit{de jure}.\textsuperscript{332}

\textsuperscript{326} \textit{Ibid.}, at para. 78 (“The territories situated between the Green Line...and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel has the status of occupying Power. Subsequent events in these territories ... have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power”). For discussion, see supra at part III(4)

\textsuperscript{327} \textit{OPT Wall}, at paras. 86–113.

\textsuperscript{328} \textit{Ibid.}, at paras. 114–137. Note that in paras. 138–142 the Court further addresses and rejects the Israeli argument that either the right of self-defense or a state of necessity “preclude(s) the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above”. \textit{Ibid.}, at para. 142.

\textsuperscript{329} \textit{Ibid.}, at para 114 (concluding the determination of the relevant rules and principles of international law to be applied in this matter).

\textsuperscript{330} \textit{Ibid.}, at para. 89 (citing both the Judgment of the Military Tribunal of Nuremberg and its own Advisory Opinion on the \textit{Legality of the Threat or Use of Nuclear Weapons} to support the conclusion that the Hague Regulations have become part of customary international law, a conclusion recognized by all participants in the proceedings).

\textsuperscript{331} \textit{Ibid.}, at para. 101.

\textsuperscript{332} \textit{Ibid.}, at paras. 90–101. See also supra n. 17.
Proceeding to determine the relevance of IHR instruments, the Court noted at the outset the divergent opinions regarding the applicability of human rights treaties to the occupied Palestinian territory, detailed three such treaties to which Israel is a party, and stated that “in order to determine whether these texts are applicable in the Occupied Palestinian Territory, the Court will first address the issue of the relationship between international humanitarian law and human rights law and then that of the applicability of human rights instruments outside national territory” (emphasis added).

Turning first to the relationship between IHL and IHR law, the Court’s starting point was to recall its 1996 Advisory Opinion on the Legality of the Threat of Nuclear Weapons, in which it opined the confluence of both regimes, designating the law of armed conflict as the lex specialis in times of hostilities.

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333 Ibid., at para. 102

334 Ibid., at para. 103. The Court cites only three human rights instruments to which Israel is a party: the ICESCR, the ICCPR and the CRC. The inference is that the Court did not consider the other human rights treaties, such as CERD or CEDAW. This failure is both disturbing and surprising: it may be possible that these treaties were not mentioned because the Court had thought them irrelevant, but this thinking process is not articulated, thus giving the impression that the Court had first fired the arrow and only then drew the target. This is disturbing. It is surprising because, following the Court’s own pronouncements at least CERD seems to be relevant: the Court notes that the construction of the wall has been accompanied by the creation of a new administrative regime and that under this regime part of the West Bank lying between the Green Line and the wall was designated as a “Closed Area”. “Residents of this area may no longer remain in it, nor may non residents enter it, unless holding a permit or identity card issued by the Israeli authorities... Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit”. Ibid., at para. 85. The Court returns to this point in the application part of the Opinion, when it determines that “[T]hat construction, the establishment of a closed area...and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto)”. Ibid., at para. 133. A regime that operates on the basis of ethnic distinctions would suggest the prima facie relevance of CERD.

335 Ibid., at para. 104.

336 Ibid., at para. 105.
Expounding on this determination, which in the context of the *Legality of the Threat of Nuclear Weapons* related specifically to the right not to be arbitrarily deprived of one's life, the Court stated as follows:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.331 (emphasis added)

Having thus concluded the co-application of both regimes in principle, the Court proceeded to analyze the scope of application of the three human right treaties it had earlier identified as relevant to the question at hand,338 in order to determine whether they apply outside the territory of Israel. In this context, it engaged first, in the interpretation of Article 2(1) of the ICCPR and concluded that it “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”339 This conclusion rested on the object and purpose of the Covenant;340 on the practice of the HRC;341 and on the travaux preparatoires of the Covenant.342 Relating specifically to the Israeli objection to the application of this Convention to the occupied territories, the Court cited with approval

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338 See *supra* n. 334.
339 *OPT Wall*, at para. 111.
the counter-position of the HRC, noting in particular the latter’s reference to the duration of the occupation; Israel’s ambiguity towards the future status of the territory; Israel’s exercise of effective control therein; and the need to protect the occupied population.  

The Court further rejected the Israeli position on the non-applicability of the ICESCR, as it had been articulated in its reports to the Committee on Economic, Social and Cultural Rights. This rejection was grounded in the general conclusion that international human rights continue to apply together with IHL in cases of armed conflicts, an application which is particularly relevant due to the fact that “the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as an occupying Power” and in the observation that the fact that the ICESCR contains no provision on its scope of application does not exclude “that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction”, as is evidenced by the language of its Article 14. Finally, the Court concluded from the plain language of Article 2 of the CRC that it is applicable to the Occupied Palestinian Territory.

B. Identification of Relevant Provisions in the Applicable IHL and IHR Instruments

Having thus determined that the normative framework comprises both IHL and IHR instruments, the Court proceeded to identify, enumerate and quote a number of their provisions in order to ascertain whether the construction of the wall is in violation thereof. The provisions thus identified were the following:

343 *OPT Wall*, at para. 110.
345 *OPT Wall*, at para. 112. In this context the Court further opined that Israel is under an obligation not to raise obstacles to the exercise of such rights in those areas where such competence was transferred to the PA.
347 *OPT Wall*, at para. 113. See *supra* part III(3)(d).
(a) The 1907 Hague Regulations – Articles 43, 46 and 52.\textsuperscript{348}
(b) The Fourth Geneva Convention – Articles 47, 49, 52, 53 and 59.\textsuperscript{349}
The identification of these provisions was preceded by the Court's noting that there is a distinction in the Convention between provisions which apply during military operations leading to the occupation and those that remain applicable throughout the occupation. On the basis of this distinction, the Court cited Article 6 (3): “In the case of occupied territory, the application of the present Convention shall cease one year after the close of military operations; however, the Occupying Power shall be bound for the duration of the occupation, to the extent that such Power exercises the functions of governments in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.”\textsuperscript{350}
(c) The ICCPR – Articles 17(1), 12(1)\textsuperscript{351}. The Court preceded this identification by noting that Article 4 of the ICCPR allows for derogation under various conditions, that Israel made use of the right to derogation with respect to Article 9 of the Convention and that, therefore, all other articles remain applicable.\textsuperscript{352}
(d) The ICESCR – Articles 6, 7, 10-14.\textsuperscript{353}
(e) The CRC – Articles 16, 24, 27, 28.\textsuperscript{354}

C. The Implementation of the Provisions

Having thus identified the relevant provisions, the Court proceeded to apply them on the basis of information submitted to it,\textsuperscript{355} and concluded that “[T]he construction of such a wall...constitutes breaches by Israel of
various of its obligations under the applicable international humanitarian law and human rights instruments." 356

More specifically, the Court found that the construction of the wall and its associate regime entail the following:

(a) The destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations and of Article 53 of the Fourth Geneva Convention; 357
(b) Impeding the freedom of movement of the Palestinian inhabitants of the occupied territory in violation of Article 12(1) of the ICCPR; 358
(c) Impeding the exercise by the Palestinian inhabitants of the right to work, to health, to education and to adequate standard of living, in violation of the ICESCR as well as of the CRC. 359
(d) Contributing to demographic changes in violation of Article 49(6) of the Fourth Geneva Convention. 360

The Court proceeded to examine whether the provisions of the applicable IHL instruments enable account to be taken of military exigencies. It found that of the identified provisions, only Article 53 of the Fourth Geneva Convention contained such a qualifying clause, but concluded that the destructions carried out contrary to the prohibition in this Article were not "rendered absolutely necessary by military operations" so as to fall within the exception. 361 A similar examination of the qualifying and derogating clauses in the various human rights conventions was also undertaken by the Court, and in this context too it concluded that the conditions laid out in such provisions have not been met in this case. 362

356 Ibid., at para. 137.
357 Ibid., at para. 132.
358 Ibid., at para. 134.
359 Ibid., at paras. 133–134.
360 Ibid., at para. 134.
361 Ibid., at para. 135.
362 Ibid., at para. 136.
III. A Brief Critical Review

The Court's opinion that IHL and IHR law are complementary, rather than mutually exclusive regimes, confirms the main thrust of our thesis. The opinion, however, leaves something to be desired both in terms of what it says and what it is silent about. The following will highlight some of our principal points of criticism.

The Court grounded its general determination that while IHL is the *lex specialis*, the human rights protection does not cease in case of armed conflict, in its previous holding on this matter in the *Legality of the Threat of Nuclear Weapons*. This reiteration, while not uncommon in judicial holdings, seems insufficient substantively, and its persuasive value could have been enhanced had the Court articulated both the long historical roots of, and the underlying rationale behind, this holding, that is, the principle of universality of human rights.363

A similar insufficiency characterizes the Court's discussion of the possible interaction between the two regimes. While the present Opinion is more elaborate on this issue than the *Legality of the Threat of Nuclear Weapons* Opinion, the discussion nevertheless falls short of being comprehensive and does not exhaust the potential the co-application of both regimes offers. The Court's reference to the alternative situations where each branch applies exclusively presumably refers to a case of a lacuna in one branch, being filled by the other. We have referred to such situations in our proposed modality (b) in the concluding section of the article.364 The Court's reference to the situation where both apply, IHL being the *lex specialis*, fails to explain its own implications: it alludes to the possibility of the primacy enjoyed by IHL in cases of direct conflict between the two regimes, a possibility which is bound to be very rare, as detailed in our modality (a)365 and it ignores altogether the interpretative consequences of their co-application, as detailed and exemplified in our modalities (c) and (d) above.366

363 For discussion, see supra part III (3) (b).
364 See supra part IV.
365 Ibid.
366 Ibid.
It is this analytical weakness that may well explain one of the most disappointing parts of the discussion, that is, the application of various provisions found in both IHL and in human rights instruments to the case at hand. That application, as we have seen, entailed essentially the enumeration and citation of various articles, but lacked any analytical input relative to the co-application of both regimes. Had the Court engaged in this analysis, it might have, for instance, explained how human rights such as freedom of movement should be read into the text of article 43 of the Hague Regulations, and how the balancing requirements enumerated in that article should affect the enjoyment of human rights in occupied territories. A discussion more focused on harmonizing the numerous obligations of the occupier would have had another salutary effect, as it would have pointed the path to be followed in order to determine the precise scope of the Occupying Power’s obligations in a certain situation.

Within the scope of this postscript, there are two additional points which deserve some critical attention: the failure to delineate the scope of application of the relevant human rights treaties; and, the Court’s simplistic interpretation of Article 6 of the Fourth Geneva Convention.

While the Court clearly stated that IHR treaties apply in occupied territories, it did not explain whether they can also apply extra-territorially to official acts undertaken in the territory of a foreign state (the ‘third circle of jurisdiction’).\(^{367}\) While some of the authorities which the Court cited support such expansive jurisdiction,\(^ {368}\) the Court ignores the divergent case law of the ECHR on the topic (particularly, the Bankovic case), and misses the opportunity to settle the law on the matter.

Secondly, we take issue with the Court’s sweeping determination that in view of Article 6 of the Fourth Geneva Convention only those provisions enumerated therein continue to apply.\(^ {369}\) In our reading, Article 6 attests, as the Commentary clarifies, to the drafters’ working assumption that within one year after the end of the hostilities, the administration of the

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367 See supra part III(3)(b).
368 OPT Wall, at para. 109.
369 The same reading of Article 6 was offered by Professor Dinstein, see Yoram Dinstein, “The International Legal Status of the West Bank and the Gaza Strip” (1998) 28 Isr. Y.B. Hum. Rts. 37, at 42–44.
territory will gradually be returned to the authorities of the occupied territory, thereby relieving the occupier of many of the duties enumerated in the Article.\textsuperscript{370} This reading of the provision not only coheres with the general impetus of the Convention but is further supported by later developments: once it became clear that the drafter’s assumption regarding the short duration of occupations was not supported by reality, and that this provision may be construed by occupying powers as limiting their responsibilities under the Convention precisely in situations where the latter should be expanded, the provision was abrogated: Article 3(b) of Protocol I provides for the application of the Protocol’s provisions until the termination of the occupation.\textsuperscript{371} Given the Court’s numerous references to the prolonged nature of the Israeli occupation in the context of the need to protect the rights of the occupied population, its interpretation of Article 6 is perplexing to say the least.

\textsuperscript{370} Pictet, \textit{supra} n. 99, at 63.
\textsuperscript{371} This is one of the grounds on which Roberts bases his contention that Article 6 has lost all importance and application. See Roberts, \textit{supra} n. 17, at 55–57. It is however unclear whether Article 3(b) obtained the desired effect: its language is open to suggestion that it applies the Fourth Geneva Convention subject to its own terms; its customary law status may also be doubted. In any event, it is surprising that the Court did not bother to discuss this issue.