INTERACTIONS BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW FOR THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

INTERACCIÓN ENTRE EL DERECHO INTERNACIONAL HUMANITARIO Y EL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS PARA LA PROTECCIÓN DE LOS DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES

Koldo Casla*

ABSTRACT**:** Economic, Social and Cultural Rights (ESCR) are at risk on the battlefield. Thus, human rights lawyers must look for legal means to guarantee the best possible protection of these rights in case of war. It is generally accepted nowadays that both International Humanitarian Law (IHL) and International Human Rights Law (IHRL) are applicable during armed conflicts. Adding on that and based on a procedural and substantive legal analysis, this paper claims that both IHL and IHRL constantly interact in a relation of synergy or norms.

*RESUMEN**:** Los Derechos Económicos, Sociales y Culturales (DESC) están en riesgo en el campo de batalla. Por lo tanto, los expertos en derechos humanos han de buscar herramientas jurídicas para garantizar el nivel más alto de protección de estos derechos en caso de conflicto armado. Hoy por hoy está generalmente aceptado que tanto el Derecho Internacional Humanitario (DIH) como el Derecho Internacional de los Derechos Humanos (DIDH) son aplicables durante los conflictos armados. Partiendo de esta premisa y sobre la base de un estudio jurídico formal y material, este artículo sostiene que el DIH y el DIDH interactúan de forma continua en una relación de sinergia normativa.

KEYWORDS**:** Economic, Social and Cultural Rights (ESCR); International Human Rights Law (IHRL); International Humanitarian Law (IHL); United Nations; Committee on Economic, Social and Cultural Rights.

*PALABRAS CLAVE**:** Derechos Económicos, Sociales y Culturales (DESC); Derecho Internacional de los Derechos Humanos (DIDH); Derecho Internacional Humanitario (DIH); Naciones Unidas; Comité de Derechos Económicos, Sociales y Culturales.*

Fecha de recepción del original: 26 de enero de 2012. Fecha de aceptación de la versión final: 19 de marzo de 2012

* Editor of the blog http://rightsincontext.eu/. Contact: koldo.casla@yahoo.es. LLB-LLM in International and European Law (University of the Basque Country, Spain), MA in Theory and Practice of Human Rights (University of Essex, UK), Fulbright MA in International Studies (University of Denver, USA).

> The injury caused by the separation fence is not restricted to the lands of the inhabitants and to their access to these lands. The injury is of far wider a scope. It *strikes across the fabric of life of the entire population*.[1]

I. INTRODUCTION

Human rights are gravely damaged in and around the battlefield. The global human rights community has been particularly active showing the human dimension of the war.[2] Human rights international judicial and quasi-judicial bodies have been quite receptive to this advocacy work, and today there is little doubt that both International Human Rights Law (IHRL) and International Humanitarian Law (IHL) matter in conflict.

However, it is certainly not enough to claim that IHRL does not disappear when a war takes place. This paper claims that in international and non-international armed conflicts, IHRL and IHL must interact in the most effective way to protect Economic, Social and Cultural Rights (ESCR). This argument requires looking at both procedural and material points. Firstly, as regards to the procedure, the identified issues are the geographical jurisdiction or territorial applicability of treaties, the limitation and derogation of rights in case of emergency, and the application of the principles of *lex specialis* and complementarity. And secondly, the study will show that the growing efforts in the human rights community to provide ESCR standards with a more detailed content, and the specificities of some rules in the field of IHL, have generated the necessary conditions for a *synergy of norms*. This paper will argue that in present times, IHRL and IHL are not two separate realms of law, but rather two expressions of the same *corpus juris* that grows in a continuous exercise of reciprocal nourishment.

---

[1] Judgment, *Beit Sourik Village Council* v. *The Government of Israel*, Supreme Court of Israel, HCJ 2056/04, 24 June 2004, para. 84. (Emphasis added)

[2] We use the expression 'global human rights community' to refer to a relatively new form of 'social movement' based on some form of 'transnational collective action'. Neil Stammers defines social movements as "collective actors constituted by individuals who understand themselves to share some common interests and who also identify with one another, at least to some extent. Social movements are chiefly concerned with defending or changing at least some aspect of society and rely on mass mobilization, or the threat of it, as their main political sanction". STAMMERS, N., "Social Movements and the Social Construction of Human Rights", *Human Rights Quarterly*, Vol. 21, No. 4, 1999, pp. 980-1008, at 985. We borrow della Porta and Tarrow's definition of 'transnational collective action': "coordinated international campaigns on the part of networks of activists against international actors, other states, or international institutions". DELLA PORTA, D. and TARROW, S., "Transitional Processes and Social Activism: An Introduction", in DELLA PORTA, D. and Tarrow, S. (eds.), *Transnational Protest and Global Activism*, Rowman & Littlefield, 2005, pp. 1-17, at 2-3.

II. INTERPLAY OF THE TWO SETS OF RULES FOR THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PROCEDURAL ANALYSIS

Both the UN Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Committee regularly apply human rights standards to international and non-international conflicts in their country reports.[3] This is also the case at the regional level with the European Court of Human Rights (ECtHR) and the Inter-American Commission and Court of Human Rights (IACHR and IACtHR, respectively).[4] The International Court of Justice (ICJ) has echoed the jurisprudence of these specialized human rights bodies on three occasions. Initially, in the *1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, as regards to the applicability of the 1966 International Covenant on Civil and Political Rights, the ICJ stated that:

> The protection of the International Covenant of (sic) Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis,* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[5]

In the *2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court expanded the argument in this sense:

> 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,

[3] See, among others, CESCR, *Concluding Observations: Sri Lanka*, 16 June 1998, E/C.12/1/Add.24; CESCR, *Concluding Observations: Colombia*, 6 December 2001, E/C.12/1/Add.74; CESCR, *Concluding Observations: Israel*, 26 June 2003, E/C.12/1/Add.90; CESCR, *Concluding Observations: Russia*, 12 December 2003, E/C.12/1/Add.94; Human Rights Committee, *Concluding Observations: DRC*, 26 April 2006, CCPR/C/COD/CO/3; Human Rights Committee, *Concluding Observations: Israel*, 29 July 2010, CCPR/C/ISR/CO/3.

[4] See, for example, Judgment, *Cyprus* v. *Turkey*, ECtHR, 10 May 2001; Judgment, *Ahmet Özkan and others* v. *Turkey*, ECtHR, 6 April 2004; Judgment, *Isayeva, Yusupova and Bazayeva* v. *Russia*, ECtHR, 24 February 2005; Judgment, *Bamaca Velásquez* v. *Guatemala*, Series C No. 70, IACtHR, 25 November 2000; Request for Precautionary Measures, *Detainees in Guantánamo Bay, Cuba*, IACHR, 13 March 2002.

[5] Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996, para. 25.

> there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[6]

And, finally, the Court confirmed the same statement in the *2005 Judgment concerning the Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda).*[7] Since this Judgment repeated the holding of the *Wall* case, it was made clear that the Court's approach in the Palestinian case cannot be explained solely by the long-term presence of Israel in those territories.

Both Israel and the United States maintain that IHL and IHRL are completely separated realms of law and, therefore, human rights standards do not and should not affect *jus in bello*. Both States deny the extraterritorial applicability of the international human rights law as well.[8] This position is also defended by some scholars in these countries.[9] Besides, Israel has also been reluctant to accept the full applicability of IHL in the Occupied Palestinian Territories, and in particular the rules set out in the Fourth Geneva Convention, which provides protection to civilians in time of war.[10]

These challenges aside, today there is little controversy among the majority of scholars and practitioners about the existence of room for human rights in case of armed conflict.[11] In the following lines, we will identify three critical issues that ought to be addressed before analyzing the substantial interactions between IHRL and IHL. First, we must determine in what conditions international rules in ESCR may be applicable extraterritorially (the issue of jurisdiction). Provided that ESCR move beyond borders, secondly, we observe the question about the limitation and derogability of rights and its implications for ESCR. Finally, assuming that ESCR obligations cross borders and cannot be freely derogated by States, we will look at the principles that inspire the determination of the applicable norms.

---

[6] Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 9 July 2004, para. 106.

[7] Judgment, *Armed Activities on the Territory of the Congo (DRC* v. *Uganda),* ICJ, 19 December 2005, para. 216.

[8] See the arguments posed by the Government of the US in the Annex I to the 3rd Periodic Report to the UN Human Rights Committee, UN doc. CCPR/C/USA/3, 28 November 2005. As regards to Israel, see the 2nd Periodic Report to the same Committee, UN doc. CCPR/C/ISR/2001/2, 4 December 2001.

[9] DENNIS, M., "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", *American Journal of International Law*, 2005, Vol. 99, No. 1, pp. 119-141. For a slightly more moderate approach, see SOLIS, G., *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, 2010, at 22-26.

[10] DARCY, S., "Punitive House Demolitions, the Prohibition of Collective Punishment, and the Supreme Court of Israel", *Penn State International Law Review*, 2003, Vol. 21, pp. 477-507.

[11] See the analysis by HAMPSON, F., "The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body", *International Review of the Red Cross*, 2008, Vol. 90, No. 871, pp. 549-572.

1. Jurisdiction and extraterritorial effects of ESCR

Often times States' obligations of ESCR are presented in comparison or opposition to States' obligations of civil and political rights (CPR). The understanding of these obligations is still more developed than that of those corresponding to ESCR, and international monitoring mechanisms have advanced much more narrowing down the meaning of the general provisions in CPR.

In order to discuss the extraterritorial effects of ESCR it is helpful to observe look at this rights in relation to civil and political rights. Article 2(1) of the 1966 International Covenant on Civil and Political Rights (ICCPR) confines the applicability of the Treaty in the State to "all individuals within its territory and subject to its jurisdiction". In one of its first opportunities to deal with an individual complaint, the UN Human Rights Committee stated that:

> It would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.[12]

More recently, in 2004, when it interpreted the general obligations imposed by the Covenant to State Parties, the Human Rights Committee declared that:

> States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. […] This principle also applies to those *within the power or effective control of the forces of a State Party acting outside its territory*, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[13]

According to this interpretation, the ICCPR would be applicable in principle in the case of "effective control" over a territory, such as an occupied territory. The United States has tried to challenge this view with some references to the declared intentions expressed by the US delegates in the *travaux préparatoires*.[14] However, according to Article 32 of the 1969 Vienna Convention on the Law of Treaties, the preparatory work

[12] Human Rights Committee, *López Burgos* v. *Uruguay*, Communication 52/1979, Views adopted on 29 July 1981, CCPR/C/13/D/52/1979, para. 12.3; Human Rights Committee, *Celiberti* v. *Uruguay*, Communication 56/1979, Views adopted on 29 July 1981, CCPR/C/13/D/56/1979, para. 10.3.
[13] Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10. (Emphasis added)
[14] Annex I to the US Report to the UN Human Rights Committee, 2005, *supra* note 8.

constitutes supplementary means of interpretation of treaties, and not of States' intentions or understandings of them.[15] The United States could have entered a reservation or a declaration in that regard, but it did not do so. At the time the United States ratified the ICCPR, in June 1992, it was already clear that the Human Rights Committee regarded the Covenant as applicable even during situations of conflict.

The European Court of Human Rights[16] has followed the interpretation of the Human Rights Committee, even though the case law is not entirely coherent.[17] In the *Loizidou* case, for instance, the Court found that the responsibility of States "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".[18] This reasoning was also used in *Cyprus* v. *Turkey*[19] and in *Ilascu* v. *Moldova*.[20] In the *Bankovic* case, the Court concluded that it is a case of extraterritorial jurisdiction:

> When the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government.[21]

Unlike treaties dealing with civil and political rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not contain a jurisdiction clause. Much of the literature has granted particular attention to the question of whether the scope of the ICESCR goes beyond both territory and jurisdiction, consequently addressing the question of obligations as regards to international assistance and cooperation.[22] That important issue aside, the ICJ firmly stated in the famous *Wall* case that "it is not to be excluded that [the ICESCR] applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial

[15] Although it has not ratified the Vienna Convention, the US generally recognizes the Convention as an authoritative guide to principles of treaty interpretation.

[16] In a similar fashion to Article 2(1) of the ICCPR, Article 1 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

[17] DROEGE, C., "Elective affinities? Human rights and humanitarian law", *International Review of the Red Cross*, 2008, Vol. 90, No. 871, pp. 501-548, at 513-517; HOROWITZ, J. T., "The right to education in occupied territories: Making more room for human rights in occupation law", *Yearbook of International Humanitarian Law*, 2004, Vol. 7, pp. 233-277, at 236.

[18] Judgment, ECtHR, *Loizidou* v. *Turkey*, 18 December 1996, para. 56.

[19] Judgment, *Cyprus* v. *Turkey*, *supra* note 4, para. 76.

[20] Judgment, ECtHR, *Ilascu and Others* v. *Moldova and Russia*, 8 July 2004, para. 312 and 314. See also Judgment, ECtHR, *Al-Skeini and others v. The United Kingdom*, 7 July 2011, notably para. 131-142.

[21] Admissibility Decision, ECtHR, *Bankovic and others* v. *Belgium and others*, 12 December 2001, para. 71.

[22] MOTTERSHAW, E., "Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law", *The International Journal of Human Rights*, 2008, Vol. 12, No. 3, pp. 449-470, at 452; GÓMEZ, F., "Transnational Obligations in the Field of Economic, Social and Cultural Rights", *Revista Electrónica de Estudios Internacionales*, 2009, Vol. 18.

jurisdiction".[23] Time will tell if the Optional Protocol to the ICESCR, adopted in December 2008 and not yet in force, will offer the possibility to extend the interpretation of the extraterritorial applicability of the Covenant through inter-State complaints and inquiry procedures, and possibly through individual complaints as well.[24]

In short, the ICJ and the human rights bodies, both at the regional and the universal levels, agree at least on the following two points: first, human rights obligations extend not only within the national borders, but also along the territory where the State exercises its jurisdiction; and second, the minimum threshold of the territorial jurisdiction is the effective control over that territory. Article 42 of the 1907 Hague Convention IV defines the occupied territory as one that is "placed under the authority of the hostile army"; the provision also states that "the occupation extends only to the territory where such authority has been established and can be exercised". This IHL provision presupposes effective authority and control, which are not usually found in the battlefield.[25] A situation of military occupation without effective control is inconceivable (indeed, the effective control is a legal requirement of occupation). That being said, there may be situations in the context of war, besides the case of occupation, in which a State exercises effective control outside its territory. In this case, "a key consideration is whether a violation resulted directly from circumstances over which the State had control, whether or not it also had overall control of the territory in which the violation occurred".[26]

We must conclude that, in terms of territorial jurisdiction, in case of occupation States are obliged to fulfill their obligations as regards to ESCR. Regarding civil and political rights, human rights bodies have extended the obligation to other forms of effective control, even for a relatively short period of time and vis-à-vis a small number of people or even a single individual. However, it remains unclear whether these other forms of effective control also trigger ESCR obligations for States beyond their national borders.

2. Limitation and derogability of ESCR

The extraterritorial applicability of human rights treaties is a relevant issue in case of international conflict. Nonetheless, the debate about the territorial jurisdictional limits simply fades in front of the more common non-international conflicts. In these cases, the derogability of rights and the principles of rule preference gain relevance.

The 1950 European Convention and the 1969 American Convention on Human Rights contain some restricted derogation clauses referring to "time of war". So does the

[23] Advisory Opinion *Wall* case, *supra* note 6, para. 112.
[24] COURTIS, C. and SEPÚLVEDA, M., "Are Extra-Territorial Obligations Reviewable Under the Optional Protocol to the ICESCR?", *Nordisk Tidsskrift for Menneskerettigheter*, 2009, Vol. 27, No. 1, pp. 54-63.
[25] DROEGE, C., *supra* note 17, at 538.
[26] LUBELL, N., "Challenges in Applying Human Rights Law to Armed Conflict", *International Review of the Red Cross*, 2005, Vol. 87, No. 860, pp. 737-754.

ICCPR for "time of public emergency which threatens the life of the nation" (Article 4). Once again, as explained above in relation to the jurisdiction, the ICESCR is exceptional as it does not include any particular provision allowing States to temporarily derogate their ESCR obligations.[27] Instead, the ICESCR contains a general limitation clause in Article 4, which permits State parties to subject the rights enshrined in the Covenant "only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". In the *Wall* case, the International Court of Justice observed that the restrictions on the enjoyment by the Palestinians of their ESCR resulting from Israel's construction of the Wall failed to meet the conditions laid down in Article 4 of the ICESCR.[28]

Although the *travaux préparatoires* do not reveal any specific discussion about whether a derogation clause was considered necessary or even appropriate, the omission of any reference to derogation in the ICESCR is probably not due to the drafters' oversight.[29] In order to understand that omission, one must look at the nature of States Parties' obligations set up in the Covenant. Article 2(1) of the ICESCR says that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

A correct reading of this phrase reveals that the expression "achieving progressively" refers to the word "rights" and not to obligations.[30] The CESCR has recognized that the rights enshrined in the Covenant are to be realized over time and that its implementation may go through different stages; however, "while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it

---

[27] Neither does the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"). However, the 1961 European Social Charter contains an extraordinarily open clause in Article 30(1) (the provision is kept intact in the 1996 Revised version of the Charter):

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

Article 31(1) of the European Social Charter also includes a general limitation clause permitting governments to restrict economic and social rights when such measures "are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals".

[28] Advisory Opinion *Wall* case, *supra* note 6, para. 112.

[29] ALSTON, P. and QUINN, G., "The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", *Human Rights Quarterly*, 1987, Vol. 9, No. 2, pp. 156-229, at 217.

[30] MOTTERSHAW, E., *supra* note 22, at 457.

also imposes various obligations which are of immediate effect."[31] The CESCR highlights two important obligations of immediate effect: the obligation "to take steps", that is, to adopt specific measures to promote the full application of the Covenant, and the obligation of non-discrimination. In addition to this, the CESCR has repeatedly affirmed that deliberate, intentional or negligent regressive measures are prohibited under the ICESCR. Consequently, States are not allowed to adopt any measure that would reduce the already attained level of enjoyment of ESCR. If the State aims to introduce regressive measures, it must explain that no other less harmful alternatives are available with the maximum use of the available resources.

The CESCR has also requested States to guarantee a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party"; the CESCR considers that "if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*".[32]

In order to comprehend the whole set of obligations derived from the Covenant, one must remember that the minimum core obligations and the obligations of immediate effect are the very minimum requirements set up in the Covenant. Even in time of emergency, such as armed conflict, no State can fall below this minimum threshold. And "once the emergency period is over, minimum measures are no longer sufficient",[33] because ESCR must be progressively realized.

In the words of Magdalena Sepúlveda, the current UN Independent Expert on the Question of Human Rights and Extreme Poverty:

> It is important to bear in mind that the rationale for derogation provisions is to strike a balance between the sovereign right of a government to maintain peace and order during public emergencies, and the protection of the rights of the individual from abuse by the State. […] [I]t seems difficult to imagine a circumstance in which derogation from the rights contained in the ICESCR would be necessary to maintain peace and order from the perspective of human rights law. For example, it is difficult to see how derogation from the right to food or the right to the enjoyment of the highest attainable standard of health would assist in resolving a conflict situation rather than worsening it.[34]

[31] CESCR, *General Comment No. 3, The nature of States parties obligations*, 14 December 1990, E/1991/23, para. 1 and 9.
[32] *Ibid*, para. 10.
[33] VITÉ, S., "The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property", *International Review of the Red Cross*, 2008, Vol. 90, No. 871, pp. 629-651, at 632.
[34] SEPÚLVEDA, M., *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, 2003, at 295.

Thus, provided that the minimum core obligations are guaranteed and that obligations with immediate effect are fulfilled, the ICESCR is flexible enough to understand the urgent needs that States must face in time of war. Therefore, there is no need (besides not existing express legal basis whatsoever, since the option is not envisaged in the Treaty itself) for States parties to derogate any right enshrined in the Covenant.

3. *Lex specialis* and complementarity of rules

Drafters of the European Convention on Human Rights, the American Convention on Human Rights and the International Covenant on Civil and Political Rights were aware of the exceptional circumstances generated in conflict and, therefore, established some minimum standards for the protection of human rights in that eventuality. These treaties are not exceptions, though. Other clauses in IHRL expressly encompass situations of armed conflicts, such as Article 2 of the 1984 Convention Against Torture, Article 38 of the 1989 Convention on the Rights of the Child, or Article 11 of the 2006 Convention on the Rights of Persons with Disabilities.

In return, IHL also acknowledges the proximity of IHRL. The ICRC Commentary to Common Article 3 of the 1949 Geneva Conventions affirms that this minimum standard "merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself".[35] Furthermore, the 1977 Protocol II contains a preamble which notes that "international instruments relating to human rights offer a basic protection to the human person". And Article 72 of the 1977 Protocol I, which delineates the field of application of the Treaty, reads as follows:

> The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

Frequently, the relation between IHL and IHRL is formulated as if the former was a sort of specialized version of the latter. In fact, as said above, in the *Nuclear Weapons* case, of 1996, the ICJ formulated that "the test of what is an arbitrary deprivation of life (…) falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".[36] In the *Wall* case, of 2004, the Court similarly concluded that it would "have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law".[37]

[35] PICTET, J. *et al*, *Commentary on the Geneva Conventions of 12 August 1949: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, 1958, at 60.
[36] Advisory Opinion *Nuclear Weapons* case, *supra* note 5, para. 25.
[37] Advisory Opinion *Wall* case, *supra* note 6, para. 112.

The problem arises when commentators attempt to define the outline of the principle of *lex specialis*, as there is not agreement about the exact meaning of it.[38] The Study Group of the UN International Law Commission on Fragmentation of International Law distinguishes two principal meanings of this principle:

> In the first instance, a special rule could be considered to be an *application*, *elaboration* or *updating* of a general standard. In the second instance, a special rule is taken, instead, as a *modification*, *overruling* or *setting aside* of the general standard (i.e. *lex specialis* is an exception to the general rule). (…) It was often impossible to say whether a rule should be seen as an "application" or "setting aside" of another rule.[39]

Article 31(3)(c) of the 1969 Vienna Convention states that treaty obligations must be interpreted in accordance with the whole of International law as a system. Considering the dichotomy presented by the International Law Commission, the interpretation of the principle of *lex specialis* that is the most consistent with the Vienna Convention is to consider the special rule as the application of the general rule in a given setting, and not as an exemption to it. *Lex specialis* should be seen as a "contextual principle"[40], and therefore, in the determination of the specialized norm, "the most important indicators are the precision and clarity of a rule and its adaptation to the particular circumstances of the case".[41] Thus, in time of war IHL does not replace IHRL; the relationship between the two sets of rules is of complementarity, and the application of the relevant norm must be determined on a case-by-case basis.

This understanding of the meaning of *lex specialis* as complementarity of norms is especially relevant in two circumstances: military occupation and non-international armed conflicts. As regards to the first one, Article 43 of the 1907 Hague Convention IV establishes a general principle of legal non-interference:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, *while respecting, unless absolutely prevented, the laws in force in the country*. (Emphasis added)

This provision must be read in conjunction with Article 64 of the 1949 IV Geneva Convention. Article 43 allows an occupant to introduce legislation if it is necessary for restoring and ensuring public order and civil life. Article 64, on the other hand, is more

[38] See a general overview of the discussion in DROEGE, C., *supra* note 17, at 523.
[39] International Law Commission, *Report of the Study Group on Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*, 28 July 2004, A/CN.4/L.663/Rev.1, para. 13.
[40] KRIEGER, H., "A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study", *Journal of Conflict and Security Law*, 2006, Vol. 11, No. 2, pp. 265-291, at 269.
[41] DROEGE, C., *supra* note 17, at 524.

specific and permits the occupant to introduce legislative changes in order to fulfill its obligations under the Fourth Geneva Convention[42] and "in the interest of the population and makes it possible to abrogate any discriminatory measures incompatible with humane requirements".[43] The law of military occupation remains incomplete as regards to the protection of civilians[44]; therefore, occupiers may invoke international human rights standards, including obviously those of ESCR, to claim that the occupied State's legislation does not respect the "humane requirements" the ICRC Commentary refers to, and consequently justify the adoption of legislative measures in consistency with IHRL. This approach is particularly useful to address the reality of the prolonged occupation, such as the one of Israel in the Occupied Palestinian Territories (since 1967) and Morocco in Western Sahara (since 1975). We can identify a three-level dimension of obligations in ESCR: the obligation to respect, to protect and to fulfill; while some IHL rules may cover to some extent the first two aspects, they fail to do so as regards to the fulfillment of rights (that is, the progressive realization of rights by taking meaningful steps towards the final goal of achieving the full enjoyment of rights for everyone).[45] As Vité notes, "when the occupation persists and the situation stabilizes, economic, social and cultural rights prove to be vital to a better understanding of the scope of obligations of the foreign power".[46]

The relevance of IHRL standards is at least as important in non-international armed conflicts. As the IHL treaty law on non-international conflicts is comparatively sparse, IHRL is in a privileged position to assist in the regulation of conduct during such conflicts.[47] Moreover, acknowledging that IHRL still matters in non-international conflicts would remove one of the reasons why States deny or insist in the existence of a conflict within their borders based on the alleged variable legal implications, because the legal obligations in relation to ESCR would not be different in either case.

In summary, the most adequate conception of the principle of *lex specialis* is to see it as a tool of interpretation among different rules that interrelate in a relation of complementarity. Consequently, the whole set of IHL rules are not always *lex specialis* and do not automatically replace IHRL in case of war; the determination of the applicable provisions must be made on a case-by-case basis. As shown, the complementarity of IHL and IHRL is even more important in military occupations and non-international armed conflicts.

[42] HOROWITZ, J. T., *supra* note 17, at 241.
[43] PICTET, J. *et al*, *supra* note 35, at 335.
[44] CAMPANELLI, D. "The Law of Military Occupation Put to the Test of Human Rights Law", *International Review of the Red Cross*, 2008, Vol. 90, No. 871, pp. 653-668, at 666.
[45] LUBELL, N., *supra* note 26, at 752.
[46] VITÉ, S., *supra* note 33, at 651.
[47] LUBELL, N., *supra* note 26, at 746.

III. SYNERGY OF NORMS AS A RESULT OF THE COMPLEMENTARITY OF RULES

With different and, often times, opposite intentions, several authors have argued that, even though IHRL may have a role to play in time of conflict, the extension of IHRL to situations of armed conflict would hamper State compliance with international law,[48] as IHRL and IHL are "similar yet separate",[49] and there are differences in the "origin, nature and philosophy" of the two realms of law.[50]

Doswald-Beck and Vité, nearly twenty years ago, observed that "the major difficulty of applying human rights law (in armed conflicts) as enunciated in the treaties is the very general nature of the treaty language".[51] The challenge of defining ESCR in operational terms (generally, not only in armed conflict) has been widely acknowledged by scholars and experts in the field.[52] However, over the last fifteen years approximately, we have experienced an improved conceptualization of ESCR that has been the deliberate result of numerous actors' contributions.[53] First, the CESCR has delineated the norms included in the ICESCR by making "stricter Concluding Observations" and more "sophisticated and precise General Comments", which elucidate the duties and framework of each of the rights; in doing so, the CESCR has "deterred noncompliance and deepened the understanding of the obligations imposed".[54] Secondly, the Limburg Principles on the Implementation of ESCR, adopted in 1986, and the Maastricht Guidelines on Violations of ESCR, adopted in 1997, both developed by groups of international experts, have achieved wide currency internationally and *de facto* status within the UN Committee on ESCR, as demonstrated by their incorporation into recent General Comments.[55] And finally, the special rapporteurs and other experts appointed by the UN Human Rights Council (and, before, by the Commission on Human Rights), scholars and NGOs working in the field have also developed meaningful tools to express, in more concrete words, the content of and obligations derived from ESCR.

---

[48] DENNIS, M., *supra* note 9, at 141.
[49] KRIEGER, H., *supra* note 40, at 289.
[50] DOSWALD-BECK, L. and VITÉ, S., "International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, 1993, No. 293, pp. 94-119.
[51] *Ibid*.
[52] SCHEININ, M., "Economic and Social Rights as Legal Rights", in EIDE, A., KRAUSE, C. and ROSAS, A. (eds.), *Economic, Social and Cultural Rights. A Textbook*, Marinus Nijhoff Publishers, 2001, 2nd edition, pp. 29-54.
[53] WELLING, J., "International Indicators and Economic, Social and Cultural Rights", *Human Rights Quarterly*, 2008, Vol. 30, No. 4, pp. 933-958, at 936.
[54] SEPÚLVEDA, M., *supra* note 34, at 11-12.
[55] CHAPMAN, A. and RUSSELL, S., "Introduction", in CHAPMAN, A. and RUSSELL, S. (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, 2002, pp. 1-19, at 4. Possibly, the *Maastricht Principles on Extra-Territorial Obligations of States in the area of Economic, Social and Cultural Rights*, presented by the International Commission of Jurists and the University of Maastricht in October 2011, will reach an equivalent status in the near future.

The rapid growth of the human rights culture opened the door to what has been defined as an "age of rights".[56] Presently, the separation between IHL and IHRL is fading away. As the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR) notice:

> The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.[57]

It is not enough anymore to claim that both IHL and IHRL apply in conflict, but one of them systematically prevails over the other in application of the principle of *lex specialis*. The complementarity of IHL and IHRL entails a new form of synergy of norms. Article 31(1) of the 1969 Vienna Convention on the Law of Treaties states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*" (emphasis added). The principle of universality of human rights alters the teleological paradigm of IHL, and encourages an interpretation according to which in the 21st century the maximum realization of human rights is the ultimate *object and purpose* of international humanitarian treaties and customary law.

This new understanding of the synergies that rise in the intersection of IHRL and IHL has some definitive implications in civil and political rights. For instance, while Article 5 of the 1949 III Geneva Convention relative to the Treatment of Prisoners of War only refers to a "competent tribunal" for the determination of prisoners' status[58], and the ICRC Commentary to a similar provision in Protocol I (Article 45) admits that "such a tribunal may be administrative in nature"[59], the ICCPR and equivalent regional texts demand the lawfulness of the detention to be determined by an independent and impartial court.[60] Therefore, the consistency with human rights law and standards would

---

[56] BOBBIO, N., *The Age of Rights*, Polity Press, 1996. (Translated by Allan Cameron; original name in Italian: *L'età dei diritti*, 1990).

[57] Trial Judgment, *Prosecutor v. Anto Furundzija*, ICTY, 10 December 1998, para. 183; Trial Judgment, *Prosecutor v. Mikaeli Muhimana*, ICTR, 28 April 2005, para. 539.

[58] Article 5 of the Convention (III) relative to the Treatment of Prisoners of War (12 August 1949) reads as follows:

> "The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

[59] SANDOZ, Y. *et al*, *Commentary on the Additional Protocols I and II of 8 June 1977*, International Committee of the Red Cross, 1987, at 552.

[60] Article 9(4) of the ICCPR says:

> "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

require the interpreter to read "judicial court" where Article 5 of the Geneva Convention just says "competent tribunal".

The implications that the synergy of norms has on ESCR certainly are not of less importance. As stated above, States must fulfill their obligations of immediate effect, namely the obligation to take steps and the obligation of non-discrimination. Occupying powers also have to take all the necessary measures to fully materialize all ESCR. Yet, the synergy or norms goes even further. As regards to the right to education, for example, Article 50 of Geneva Convention IV[61] must be read in conjunction with Article 13(2)(a) of the ICESCR, which categorically establishes that "primary education shall be compulsory and available free to all". Lawyers in the field of IHL must also pay attention to other requirements set up in General Comment No. 13 of the CESCR.[62]

Regarding the rights to health and food, although the Geneva Convention IV and Additional Protocol I contain several detailed provisions to protect these rights[63], human rights require looking beyond those clauses. For example, the CESCR has declared that "public health strategy and plan of action" form part of the essential obligations of the right to health.[64] As regards to the right to food, the CESCR considers that "the obligation to fulfill (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security".[65] Therefore, once the emergency period is over, the occupier is required not only to provide food to the civilian population, but to make sure that civilians have access to the resources and means to ensure their own livelihood.[66] It has been argued, as well, that the development of IHRL has expanded States' obligation to accept and to facilitate humanitarian assistance in both international and non-international conflicts, even where the denial of such assistance does not necessarily threaten the survival of the civilian population.[67]

---

[61] Art. 50 of this Convention, in paragraphs (I) and (III), reads as follows:

> "The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.
>
> (…)
>
> Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend."

[62] CESCR, *General Comment No. 13, The right to education*, 8 December 1999, E/C.12/1999/10.

[63] Among others, Articles 55, 56 and 59 of the Geneva Convention IV, and Articles 11, 54 and 69 of the Additional Protocol I.

[64] CESCR, *General Comment No. 14, The right to the highest attainable standard of health*, 11 August 2000, E/C.12/2000/4, para. 43(f).

[65] CESCR, *General Comment No. 12, The right to adequate food*, 12 May 1999, E/C.12/1999/5, para. 15.

[66] VITÉ, S., *supra* note 33, at 641.

[67] BARBER, R. "Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law", *International Review of the Red Cross*, 2009, Vol. 91, No. 874, pp. 371-397.

Finally, the outline of the protective provisions of property in IHL may also look slightly different in the light of human rights standards, especially in connection with the right to housing (Article 11 of the ICESCR) and the right to culture (Article 15 of the ICESCR). Indeed, the attack and destruction of homes affects human rights beyond the mere right to property. Along these lines, in 2003 the Human Rights Committee expressed in relation to Israel that the "partly punitive nature of the demolition of property and homes in the Occupied Territories" contravenes the right not to be subjected to arbitrary interference with one's home (Article 17 of the ICCPR), the freedom to choose one's residence (Article 12), the equality of all persons before the law and equal protection of the law (Article 26), and the right not to be subjected to torture or cruel and inhuman treatment (Article 7).[68] Furthermore, bearing in mind UN General Assembly Resolution 1803 (XVII), of 14 December 1962, entitled "Permanent sovereignty over natural resources", the plundering of natural resources must be considered a type of pillage, prohibited under customary law,[69] and a violation of the right to self-determination recognized in Article 1 of the ICCPR and ICESCR.

IV. CONCLUSION

International Human Rights Law and International Humanitarian Law share the responsibility to protect civilians' rights in time of conflict; "there is no going back to a complete separation of the two realms".[70] The interrelation of the two sets of rules, though, goes beyond the mere determination of the relevant provision to each case. IHL and IHRL interact in constant reciprocal nourishment that leads to what we have called a *synergy or norms*.

The synergy or norms has a direct effect on the way in which IHL provisions are understood. This paper has given a few examples of these implications for some socioeconomic rights: education, health, food and property/housing. However, further research is definitely needed in order to define in detail how IHRL standards influence the reading of IHL for the protection of ESCR.[71] The CESCR could also provide some assistance with the adoption of a General Comment about the nature of States' obligations in time of emergency, like the Human Rights Committee did in relation to the ICCPR in 2001.[72] This tool would grant the CESCR the opportunity to reconfirm in abstract terms the opinion it has already expressed in the study of several States' reports, that is, that the ICESCR is also applicable in time of war and military occupation. A General Comment would also supply practitioners in human rights and

[68] Human Rights Committee, *Concluding Observations: Israel*, 21 August 2003, CCPR/CO/78/ISR, para. 16; the same point was made in the Concluding Observations of 2010, *supra* note 3, para. 18.
[69] HENCKAERTS, J. and DOSWALD-BECK, L., *Customary International Humanitarian Law, Volume 1: Rules*, Cambridge University Press – International Committee of the Red Cross, 2005, rule 52.
[70] DROEGE, C., *supra* note 17, at 548.
[71] Some authors have already made important contributions. Particularly noteworthy are HOROWITZ, J. T., *supra* note 17, and VITÉ, S., *supra* note 33.
[72] Human Rights Committee, *General Comment No. 29, States of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11.

humanitarian law with some guidelines in order to monitor ESCR when they are needed the most, that is, when war and occupation *strike across the fabric of life of the entire population.*