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人权委员会
增进和保护人权小组委员会
第五十七届会议
临时议程项目 3

司法、法治和民主

弗朗索瓦斯·汉普森和易卜拉欣·萨拉马提交的关于人权法与国际人道主义法关系的工作文件*

* 鉴于本文件篇幅超过大会规定的限度，尾注不译，原文照发。

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概　要

本工作文件分为两部分。第一部分由萨拉马先生编写，一般地涉及人权法与国际人道主义法的关系问题，指出了可能需要进一步研究的领域，特别是有关冲突情况中侵权的预防及体制对策问题。第二部分由汉普森女士编写，联系各人权条约机构和特别程序的判例，分析了这两种法律制度能否同时适用的问题。建议在适用国际人道主义法之外，人权机构均应予以考虑。第二部分随后考虑了人权法在多大程度上可以域外适用的问题，同样，这方面也联系了各人权机构的实践。本文件最后提出了可以作为进一步研究主题的领域。文件编写人认为，完全应当设立一个小组委员会的工作组，审议这些问题。

目 录

导　言

1. 小组委员会第 2004/118 号决定请弗朗索瓦斯·汉普森和易卜拉欣·萨拉马编写一份关于人权法与国际人道主义法关系问题的工作文件。本文件是根据这一要求提交的。

第 一 部 分

导　言

2. “就已编纂的法律而言，我们这一代人继承的财富最多。我们有幸拥有的，不啻一项国际人权宪章，其中有保护最弱者，包括冲突受害者及受迫害者的庄严规范。……但我们的宣言如果不付诸实施，就是一纸空文。没有行动，我们的承诺就毫无意义。”联合国秘书长在“大自由：实现人人共享的发展、安全和人权”的报告[1]中用这些措辞谈到人权运动的两难境况，对于侵犯人权和违反国际人道主义法作为的受害者，这是一种悲剧，而考虑和反思这一问题则是增进和保护人权小组委员会面临的一项挑战。

3. 武装冲突本身就是对现代法律基本概念的挑战。确保在武装冲突期间对人权和尊严最起码的尊重继续是国际社会面临的难题。秩序与混乱、法律与强力、人的尊严与战争这些相互矛盾的概念难以调和，而科学的发展、大规模毁灭性武器、恐怖主义和许多其他现代跨国现象只会加剧这些困难。毫无疑问，在所有这些现象中，最糟糕的仍然是道德进步与科技进展之间不断扩大的差距。对人权界的一项基本要求是要面对这些挑战和弥合上述差距，而人权法、国际人道主义法和国际难民法之间无法摆脱的联系又在不断激励上述要求，这些法律都来源于相同的基本关注：确保时时、处处在所有情况下尊重人权。牢记这一基本的“存在的理由”是为国际人道主义法注入新生命的一个先决条件。

4. 与各项主要国际人权法公约的情况相反，各条约机构或任何其他有能力和有约束力的机制都不在监测国际人道主义法以监督其实施情况，也不在通过一般的和具体的评论对其逐步发展做出贡献。在人权作为国际社会的决定性主题和国际决策的关键因素的时代，各种人为的区分和虚假的法律论据背后隐藏着如此巨大的保

护差距，这是不能容许的和没有道理的。即使有人不同意其某些含义，但秘书长以下说法的主旨却仍然不容争辩：“任何法律原则，甚至主权，都不应成为掩盖灭绝种族罪、危害人类罪及大规模苦难的幌子”。[2]

一、前提和问题

5. 无论其显得如何令人印象深刻，现有一系列与武装冲突期间保护平民有关的法律文书都并未提供实地的充分保护。国际社会仍然目睹大规模的暴力事件和大量的侵犯人权行为。在这方面，国际人道主义法和人权法之间的关系是矛盾的，因为国际社会日益意识到这两套准则趋同，但同时又存在没有探索的互补的可能性。

6. 就这两套准则的总体来说，特别法的概念并未将人权法和国际人道主义法置于一种非此即彼的状况，这两套准则是同一学科的两个相互支持的分支。历史上重大的人间暴行——无论是否在武装冲突期间犯下，大都是始于某些倾向、意识形态、零星的行为或其他形式的触发事件——后来发展成为人类所目睹的最严重的一些罪行。例如，纳粹大屠杀始于种族主义的意识形态和零星的事件，这些问题一直没有得到纠正，最终发生了所有那些众所周知的暴行。后续行动和预警机制在国际人道主义法中是弱项。因此，必须研究可能的体制互补性和两套准则之间能否相互加强的问题。

7. 毫无疑问，60 年前，通信手段不如今天这样发达，但是也必须承认，即使是在现代，在我们能够得到关于所有专题和事态发展的充分信息的时代，国际上对许多普遍的侵犯人权行为的反应，可能就因为缺乏有效的专门监督制度这一简单的原因而延误，而正是依据这种制度就可以进行合法的国际干预，处理严重和紧迫的侵权情况。这不仅是指经过改革的安全理事会要在所有情况下无例外地执行《宪章》的规定。同样重要的是要加强国际人道主义法机制，在侵权行为对国际和平与安全构成威胁之前，就要确保尊重国际人道主义法的规定。《宪章》序言中“欲免合世再遭……”的庄严承诺在卢旺达和其他地方遭到破坏。

8. 国际人道主义法与人权法之间的一项重大区别是，后者通过非政府组织的宣传倡导和国家人权机构的监督提供更多的保护。除了公众舆论和广大民间社会之外，这些机构在使国家实践符合国际人权准则和标准方面发挥着决定性的作用。对于武装冲突的现实情况，所有这些行为者显然拥有较少的获得信息的手段和互动的

自由。因此，在武装冲突的情况中，必须更好地利用人权机制，以弥补此种监督的差距。人权法与国际人道主义法之间在规范上的差异并不排除同一学科的这两个分支之间必要的体制互补性，二者目标都是一个：确保在所有情况下尊重人的尊严。国际人道主义法和人权法之间的一些差异，以及武装冲突的性质影响到非政府组织的作用，其作用在武装冲突之时难以发挥。尽管有各种安全关注，但有些国际人道主义法的概念，如“军事上必要”和“附带损害”，在“传统”人权法的范围内不容易被接受。因此可能需要为一些非政府组织进行特别培训，以便更好地促进国际人道主义法和人权法的准则和实际标准之间必要的互补性。

二、可能相互加强

9. 违反国际人道主义法在性质上就是侵犯人权，而确保尊重国际人道主义法却不一定确保尊重所有各项人权。说到底，如能充分尊重所有各项人权，那么本来也就没有必要诉诸国际人道主义法保护。人权委员会关于在武装冲突中保护平民的第 2005/63 号决议建立在三个前提上：“人权法和国际人道主义法互为补充，相辅相成”、“在国际人道主义法作为特别法适用时，人权法提供的保护在武装冲突情况下依然有效”以及“违反人道主义法的行为……也可能构粗暴侵犯人权行为”。它们确实是国际人道主义法和人权法互为补充、相辅相成的三个支柱。这种互补性不仅是理论上的，而且及于实施层面。我们同意 Rosemary Abi-Saab 的意见：

> “如果人道主义法和人权法具有一项共同和同样的目标，即在武装冲突中或在和平时期保护个人免受对其人身完整的所有可能的侵害，那就毫不奇怪，国际法的这两个分支具有互补性。……这是一个双向的进程，在这一进程中，一种人道主义法的办法能够补充或替代一种人权法的办法，在人权保护受到严重限制或完全中止的情况中保护个人。……除了人权法和人道主义法在规则构成和内容及其实际执行中这种明显的相互渗透以外，这两者之间的相互关系在实施方面可能也很有用。诉诸人权，将其作为在所有情况下普遍适用的国际法准则，高于并超过各项条约义务，这将有助于找出各项一般义务以及可能违反这些义务的情形，从而为这些侵权行为定罪开辟道路”。[3]

10. 第 2005/63 号决议并非第一次承认国际人道主义法和人权法之间互补性；它仅仅表明了同一学科两个分支之间业已存在和累积的相互接近的进程。人权委员会就各个国别情况中的人道主义法问题赋予特别报告员、事实调查团和特别届会或特别会议设立的调查委员会任务授权的情况已有很多先例。委员会确定标准的工作也涵盖国际人道主义法问题，如武装冲突中的儿童问题。

11. 该决议实际上反映出，对国际人道主义法和人权法，日益迫切地需要采取一种创新的面向受害者的办法。正如 H.J. Heintze 所指出：

> “法律文献恰当地指出，人权保护不仅与国际人道主义法具有共同的哲学出发点，而且还可用于弥补国际人道主义法的不足。国际人道主义法实施机制发展不足，必须说是相当无效，这是其重大弱点之一。因此毫不奇怪，[红十字国际委员会]和学术界多次尝试利用联合国人权条约、裁军条约和环境条约的实施机制，将其作为可能的制度，通过国家报告程序确保遵守国际机制。”[4]

12. 提高国际人道主义法的效力及其与人权法的机构互补性并不一定要求修订现有准则或确立新的标准。如果使用得当并得到充分实施，现有文书可以实现这一目标。例如，设立特设国际刑事法庭和国际刑事法院就是对世界各地严重和大规模违反国际人道主义法和人权法的行为的一种反应；起诉对此种严重侵权行为负责者可以产生一定程度的威慑力。

13. 尽管如此，各国国际刑事法律义务的基本弱点是，缺乏对国家行为的监督，也就无法履行在国家一级起诉的国际义务。如果说人权法从国际人道主义法中“借用了”引渡或起诉的原则，但人权法却仍然没有监督其实施情况。出于明显的政治、法律或经济方面的理由，各国可能在就武装冲突引起的罪行起诉其国民方面犹豫不决，即使在提交国家法院起诉的情况下，面对此种案件，各国也可能设法影响其本国司法部门的公正性。在有些情况下，继承政府倾向于和解而不愿追究责任，其结果是严重违反国际人道主义法和其他侵犯人权的人不受处罚。

14. 这些仅仅是人权机制在缩小保护差距方面可以发挥作用领域的两个例子。在实施刑事制裁方面，国际人道主义法相对较弱。国际人道主义法任何强制执行措施都需要得到冲突当事方同意，这就意味着要受到权力平衡的制约，或受到各自国家法院的制约，而众所周知，国家法院在此种案件中有各种局限性。在大多数需要

保护的案件中，只有人权机制仍然具有某种法律基础和一般权限。通过行使这项有关武装冲突的一般权限，人权机制能够表明，人权法和国际人道主义法是同一学科的不同分支，表明《宪章》最初设想要求体制互补。[5]

15. 在《马腾斯条款》中，也可以找到国际人道主义法和人权法之间体制互补性的重要的概念和法律根据，其中规定，无论条约法义务如何，在武装冲突期间，所有平民“仍受来源于既定习惯、人道原则和公众良心要求的国际法原则的保护和支配”(1949 年日内瓦四公约《第一附加议定书》第一条第二款)。国际人道主义法的这项规定可能具有重大的实际意义和体制意义。

16. 实际上，国际法院 1996 年 7 月 8 日在一国使用核武器的合法性问题的咨询意见中认为，《马腾斯条款》“已证明是应付军事技术迅速演变情况的一种有效手段”(咨询意见第 78 段)。因此，“人道原则和公众良心要求”不单纯是道义上的指导方针，而且是具有法律约束力的衡量标准，我们必须据以衡量有关人权的所有行为、事态发展和政策。

17. 沙哈布丁法官在反对意见((英文)第 22-23 页)中说，《马腾斯条款》不仅确认习惯法为法律原则，而且还将“人道原则和公众良心要求”确立为法律原则。他实际上引证了美国纽伦堡军事法庭 1948 年的克鲁伯案件，法庭在该案中说，这一原则已“变成为法律标准，当……公约的具体规定所未包括……的具体情况时即予援引”。威拉曼特里法官认为，“《马腾斯条款》明确指出，在这些已经制定的具体规则的后面，存在着许多一般性原则，足以适用于尚未以具体规则处理的各种情况”。

18. 很显然，人权法的发展增加了可能违反《马腾斯条款》的频率。人权规范和标准的范围越是扩大，“人道原则和公众良心要求”的适用就越广泛。因此我们同意以下意见，认为《马腾斯条款》扭转了国际法的经典假设。关于人权法和人道主义法，人们不能假定，凡法律没有明确禁止的均可允许实施。[6]

19. 通过相关人权机制要求必须履行国家起诉违反国际人道主义法的人的义务，毫无疑问可提高国际人道主义法的效力，对显然对平民危险得多的武装冲突情况中犯下最恶劣形式侵犯人权行为的肇事者构成了必要的威慑。实际上，承认对违反战争法负个人罪责的倾向尚未得到对国家义务可靠监测的辅助，而这种监测可确保此种个人责任受到有效的法律制裁。

20. 同样在互补性的范围内，对侵犯人权行为受害者的补偿问题是另一个重要的领域，在这一领域，各项人权准则和文书可以极大地有助于减轻违反人权法和国际人道主义法行为受害者的痛苦，无论此种侵权行为发生在和平时期还是武装冲突期间。

21. 国际人道主义法和人权法日益趋同和互补的另一个重要方面是，安全理事会越来越多地审议涉及国际人道主义法和人权法、构成对国际和平与安全的威胁的侵权情形。这一事实使得秘书长在最近的改革提议中得出结论认为，“人权事务高级专员必须在安全理事会以及拟议的建设和平委员会的审议活动中，特别是在安全理事会各项决议有关规定的执行方面，扮演更积极的角色。”[7]

22. 就这项建议强调确保尊重人权的重要性，将其作为预防冲突和建立和平的重要支柱而言，我们当然同意。这仅仅在侵犯人权行为被证明已达到威胁国际和平与安全的程度时才适用。此外，人权事务高级专员在这一领域扮演“更积极的角色”，则只有在安全理事会要求之时才能按照要求做到。只有在最佳可能地利用所有相关人权条约机构和特别程序的基础上，高级专员才能以可信的方式在这一极为敏感的领域发挥作用。这些机制构成高级专员的“人道主义武库”，是她在保护方面的“正规军”，是她的体制基础及其结论和合法性的来源。

23. 换句话说，如果高级专员要从人权的角度在和平与安全问题上发挥更大的作用，监督相关国际人道主义法准则和标准的遵行情况的工作就应当以与红十字国际委员会协调的方式包括人权高专办。并不是要高级专员单纯为安全理事会的审议增加政治或道义的分量，由于《宪章》和设立人权高专办的决议，她实际上具有此种分量。高级专员所作贡献增加的价值应当是为辩论的问题注入一个适当的体制上的人权内容，确立人权机制提供的可靠证据，从国际人道主义法和人权法的角度提出补救办法，从而依托技术上可靠的基础证明解决冲突和建立和平方面人权组成部分的作用。

三、先例和类推

24. 许多研究涉及人权机制在国际人道主义法领域的做法，分析了许多先例，其总体结果表明，日益增加的趋势是，在一个国际人道主义法和人权法观点的共同框架内涵盖国际人道主义法问题。这方面的办法和方法因有关情况的特点而不同。

25. 安全理事会越来越多地将国际人道主义法和人权法问题结合在一起处理。秘书长关于灭绝种族问题的特别顾问与高级专员和各项人权特别程序密切合作，其任务授权在这方面树立了一个重要先例。安全理事会请秘书长“向安理会提供联合国系统内关于严重违反包括国际人道主义法和人权法在内的国际法的案件，以及关于特别是族裔、宗教和领土争端、贫穷和缺乏发展所引起的潜在冲突局势的情报和分析，并决心认真审议有关安理会认为对国际和平与安全构成威胁的局势的这些情报和分析”。[8]

26. 安全理事会关于达尔富尔的第 1591(2005)号决议是另一个重要先例，从中可以做出有用的类推，用于人权法和国际人道主义法的共同目标。安理会在该决议中不仅述及和监测苏丹国的责任，而且还述及和监测根据安理会暂行议事规则第 28 条所设委员会以各种来源的资料为依据点名的个人的责任，“这些人妨碍和平进程，对达尔富尔和该区域的稳定构成威胁，违反国际人道主义法或人权法或犯下其他暴行”。

27. 根据这一先例，明显的问题是：何种程度的暴行应触发安全理事会的行动，使两套规则联系起来，强制执行国际人道主义法和人权法准则？紧接着又出现另一个问题：即使我们仅为争论的目的承认人的痛苦可以按照暴行的尺度分类，但是，拥有大量可观的一系列人权和国际人道主义法准则和标准的国际社会，在面对世界任何地方可能演化为大规模侵犯人权事项的早期迹象之时保持沉默、不采取行动或效率低下，这仍然是不能允许的。这就是我们所认为的缺失的环节，也是一种新的权利：得到体制保护的权利，武装冲突受害者得到所有相关机构充分保护的权利，这些机构能够也应当直接或间接地减轻其痛苦。

28. 在确保在所有国家和所有情况下尊重人权方面，需要做的是，要求相关人权机制监测国家和国际性质武装冲突的所有情况，以发现并阻遏所有可能的违反人权法和国际人道主义法的行为。我们同意 Hans-Joachim Heintze 的意见，他说：

> “研究表明，人权法和国际人道主义法所提供的保护趋同。这两套法律都可适用于武装冲突，以实现《马腾斯条款》意义上尽可能最大程度的保护。其最重要的实际后果是，有可能强制执行国际人道主义法。由于国际人道主义法执行机制不足，不能指望最近的将来国家报告和个人申诉程序予以详细阐述(原文如此)，现行人权程序更具实际重要性。最初适用国

际人道主义法的一些有所顾虑的决定表明：‘概言之，尽管上述人权机构的实践仍然有限，但却是对诚然有限的一系列国际手段的一个值得欢迎的增补，强制武装冲突各方遵守国际人道主义法。这清楚地表明了人权法和国际人道主义法趋同的实际有用的影响。’”[9]

29. 反对酷刑是人权法和国际人道主义法互补的另一个领域。酷刑在和平时期和武装冲突期间都可能发生。国际人道主义法和主管人权机制应当协调其行动，以确保尽可能最有效地保护酷刑受害者。国际人道主义法和人权法都对反对酷刑的斗争做出了具体的贡献。我们同意下列意见：“国际法的现况表明，人道主义法和人权文书一道提供了一套完整的准则和程序，用于执行有关法律、预防和制止酷刑行为。今天，一个领域的弱点通常可以通过援引另一个领域的文书而得到补偿。”[10]

四、结　论

30. 基于上述考虑，需要审议下列问题和备选办法。

31. 随着 1948 年《世界人权宣言》的通过，个人的尊严成为了国际法律制度中的中心参照点。由此在规范和体制两方面建立了一个国际保护制度。尽管有意识形态争议、选择性和政治化—这是人权和人道主义政策的一个固有部分，这一制度仍然一直在发展。应当通过加强条约机构、特别程序、增进和保护人权小组委员会及非政府组织的作用来抵消此种负面因素，它们比国际法的任何其他分支都更加能够影响人权准则和标准。这些“欲免后世再遭……”庄严承诺的捍卫者，能够也应当以技术上合理、实际上有用和可行的方式，支持人权法和人道主义法这两种传统之间日益增加的趋同倾向。在大多数情况下，这两套准则可平行适用，但在有些情况下，它们可以用一种互补的方式适用。[11] 两套相互支持的准则只会加强在所有情况下保护人权，George Abi-Saab 教授将这一目标称为“战后国际法的最大胜利”。[12]

32. 在等待进一步研究实现这一目标的方法的同时，应当向委员会建议的第一个步骤是，委员会要求其所有专题特别程序在各自的任务授权范围内，注意实际或可能的武装冲突的情况，并在其审议和报告中列入相关国际人道主义法问题。“在今天的情况下，看来至关重要的是要多重利用业已存在的各种程序。由于人权法保护和国际人道主义法重叠，此种多重利用看来是可能的”。[13] 建议委员会请所有成员国在武装冲突情况中，根据日内瓦四公约共同的第一条，在其对《日内瓦第四公

约》“在一切情况下”“尊重并保证被尊重”的承诺范围内，向专题任务执行人发出长期邀请，这样做也可能有用。

33. 还可鼓励人权条约机构审查，是否宜请成员国专门就国内紧张局势和国际武装冲突情况中的人权问题提交补充报告。在所有情况下，涉及国际人道主义法问题的任何人权机制的范围都应当限于所审议问题的人道主义部分，而不应当包括其政治方面。这种方法和权限方面的限制对避免将国际人道主义法政治化是必不可少的。

34. 或许还宜考虑建议委员会请 1949 年日内瓦四公约缔约国定期举行专题会议，审查影响各项公约适用的一般性的具体问题。1998 年在日内瓦举行了专家会议，审查与日内瓦四公约适用相关的具体问题，在这方面树立了一个有用的先例。这是一次专题会议，不涉及任何特定情况，这正是未来可能举行的此类会议应当进行的方式。应当邀请相关人权特别程序参加此种定期的专家会议，以加深从事人道主义工作的各种行为者和组织之间的了解，并受益于他们之间的经验交流。

35. 为了在人权委员会的主持下深入了解人权法和国际人道主义法之间的联系，或许宜考虑设立一个小组委员会工作组(也许可替代因达到目的而将予终止的一个现有工作组)，以处理因国际人道主义法与人权法而引起的多学科问题，并作为一个咨询单位，加强与成员国、红十字国际委员会和非政府组织之间为此目的而开展的相互补充的系统对话。国际社会不断扩大，它没有立法权，面临着各种存在的挑战，因此，此种系统的学科间辩论比以往任何时候都更加重要。

36. 通过此种系统的对话，可以实现人权特别程序有关武装冲突的行动与红十字国际委员会的活动之间的协调和互补。在这方面，无需红十字国际委员会改变工作方法。各种行为者各自的任务十分明确，人道主义行动从不同视角的国际协调只会提高其效力。正如红十字国际委员会前主席索马鲁加先生 1995 年 12 月 4 日在红十字会和红新月会国际会议上所说，“我们面前的任务日益重大，机构越来越多，因此现在比以往任何时候都更加需要加强从事人道主义工作各组织之间的磋商与合作进程。在国际红十字和红新月运动内部，红十字国际委员会的作用是协调武装冲突情况中的人道主义活动。红十字国际委员会本着开放、互补和团结的精神，与该运动各组成部分及实地其他伙伴一道投入这一长期的磋商进程，同时适当尊重每个实体的具体任务。”

37. 在没有一个常设的国际人道主义法监督机构的情况下，特设国际刑事法院和(将来的)国际刑事法院，以及相关联合国机构，甚至某些国家法院，在解释国际人道主义法准则方面都可以发挥重要作用。在国际一级，还没有一个能从此种重要的司法贡献中受益的结构。因此，编撰此种司法判例和解释，作为软法律的一个辅助渊源，作为未来习惯准则的一个可能指标和查明“人道原则和公众良心要求”的一个实用工具，这样做将会是有用的。通过设立提议的小组委员会武装冲突中人权问题工作组，可以加强国际人道主义法的此种逐渐发展进程。这仅仅是此种论坛如何能够有助于处理国际人道主义法领域与人权领域缺失的环节，并填补现有保护差距的一个例子。这个新的磋商和对话的论坛应当是一个专家机构，它将仅开展专题研究，就加强两套重要准则和文书——在突出人的尊严方面其正在趋同——之间机构互补性的方法和手段问题通过小组委员会向委员会提出提议，同时尊重其规范方面的差异和特性。

第 二 部 分

导 言

38. 本文件第二部分在评述两种法律制度的沿革和性质之前，首先明确有关术语，然后分析两套规则同时适用的情况。作为一个独立但与此相关的问题，本文件审议了在冲突当事方国家领土以外，人权法在多大程度上适用的问题。最后，本文件提出很可能引起困难的一些特定问题。

术 语

39. 人们有时用三个阶段来表述冲突期间适用的规则：战争法、武装冲突法和国际人道主义法。[14] 本工作文件用武装冲突法/国际人道主义法表述特别适用于冲突情况的整个规则。这些规则规范冲突期间发生的事项。这些规则与那些规范诉诸武力是否合法的规则很不相同。本文完全不涉及那些规则。无论诉诸武力是否合法，适用于冲突期间的规则均适用。

40. 报告本部分讨论人权法，而不是更广义的人权。因此，其中包括人权条约法和由于《宪章》机制的工作而建立的规则。大多数机制都有十分具体的任务授权，

各特别程序也是如此。[15] 然而，委员会和小组委员会则拥有相当广泛的任务授权。在本文件(的英文本)中，用 HRsL 来指上文界定的人权法。

一、武装冲突法/国际人道主义法和人权法的沿革和性质

A. 有关法律制度的历史

41. 规范冲突中行为的规则的历史与人权法的历史明显不同。[16]

42. 武装冲突法/国际人道主义法的历史表明

- 这一套规则有着十分古老的渊源；
- 受到条约规定规范的程度，至少是国际冲突；
- 人们晚近才认识到，已经存在很多关于非国际冲突的习惯法；
- 除了有关作战人员地位的规定之外，各国愿意将武装冲突法/国际人道主义法条约的适用扩大到非国际冲突；和
- 直到最近，除了通过国内刑法之外，执法机制相对缺乏。

43. 人权法通常的理解的准则始于国内一级。它有时是当地普通法的一部分，如英国的人身保护令状，有时是宪法解决办法的一部分，如法国的《人权和公民权宣言》。将人权列入《联合国宪章》，包括关于建立人权委员会的提法，以及通过《世界人权宣言》，毫无疑问是国际人权法发展中最重要的一步。在 1945 年以来的这一时期中，在区域和国际一级拟订了各种人权条约。人权委员会在专题和国别报告员及工作组等其他机制的发展中发挥了至关重要的作用。

44. 相对于武装冲突法/国际人道主义法而言，人权法最突出的特征包括：

- 在国际一级，人权法相对较新；
- 随着实体准则的发展，发展了监测和/或执行准则的机制；和
- 发展了对联合国所有会员国、而不仅仅对批准条约的国家拥有管辖权的机制

B. 法律制度的性质

45. 两种法律制度的最终目标大体相同，但却以完全不同的方式争取实现这一目标。也许不可能将两套规则合并起来；而是，由于会丧失为其特定目的专门设计的法律制度的好处，这样做也并不可取。两种制度都谋求避免不必要的死亡、伤害和破坏，但武装冲突法/国际人道主义法的出发点是士兵杀人的权利。[17] 而人权法的出发点是禁止任意杀人和保护生命权的义务。[18] 这两种制度不同的法律性质反映在一系列重要的法律差别之中，很容易被忽略。

46. 在性质上，人权法基本上是民法，而非刑法。其中包括国家的义务，应通过宪法、国内法律、法规、做法和政策予以落实。[19] 其重点是受害者与国家之间的关系，而非受害者与肇事者之间的关系。

47. 在国家间一级，武装冲突法/国际人道主义法可以作为国际民法义务执行，例如提交国际法院。[20] 这些条约本身的规定以及实体准则的内容和性质十分清楚地表明，主要打算通过国内刑法、第三国的国内刑法和国际刑法执行。[21] 其重点在于侵权行为和肇事者，而不在于受害者。刑法既包括军事也包括民事刑法。因此，问题并不在于不存在执行武装冲突法/国际人道主义法的机制，而是在于并未经常利用有关机制。

48. 民事与刑事诉讼之间的根本区别还反映在通常适用的程序规则和证据规则方面，反映在举证责任和证据标准方面。

49. 武装冲突法/国际人道主义法规定了国家间索赔，但没有明确规定个人索赔。但是，武装冲突法/国际人道主义法中也没有任何地方排除个人索赔。[22] 很有可能，控告违反人权法——同时也违反武装冲突法/国际人道主义法——事项的请求人越来越多地利用人权法中的个人请求权，原因之一是他们没有对后者加以补救的其他有效手段。[23] 《国际刑事法院规约》处理了这一问题。[24] 实际中其如何发挥作用则有待观察。

50. 很清楚，这两种法律制度可能表现为很不相同的形式，但这两种法律制度都涉及一系列类似的关注问题，它们互为补充。这一点得到委员会的确认，委员会在第 2005/63 号决议中说，“人权法和国际人道主义法互为补充，相辅相成”，“在国际人道主义法作为特别法适用时，人权法提供的保护在武装冲突情况下依然有效”，并在第 1 段中强调，“违反国际人道主义法……的行为也可能构成粗暴侵犯

人权行为”。因此必须考虑两种法律制度的适用问题，以便确定是否有两套规则都适用的情况。

二、人权法和武装冲突法/国际人道主义法的适用性

51. 是否存在关于这两种法律制度之间关系的实际——相对于学术而言——问题，取决于对两个问题的解答。第一个问题是，人权法和武装冲突法/国际人道主义法是否相互排斥。第二个问题与此相关但又不同，这一问题是，在国家领土之外，国家在多大程度上负有人权义务。这一问题将处理。

52. 第一个问题历来颇有争议，至少在学术界是如此。1970 年代，关于这一问题，有相当多的学术文献。具有武装冲突法/国际人道主义法背景的人的论点往往是，人权法仅适用于和平时期，武装冲突法/国际人道主义法是适用于冲突情况的唯一一套规则。[25] 具有人权法背景的人则很可能认为，人权法在所有情况下都适用，尽管方法有些不同。[26]

53. 由于人权机构、特别是那些处理个人申诉的机构不得不处理武装冲突情况中发生的、与冲突直接相关的所称侵权事项，这一问题具有真正的实际重要性。有关问题的分析将在体制基础上进行，而不是按照案例法发展的时间顺序进行。

54. 看来有三种理论上的可能性：(一) 作为一个法律事项，武装冲突法/国际人道主义法的适用取代人权法的适用；(二) 作为一个法律事项，武装冲突法/国际人道主义法的适用完全不影响人权法的适用，或介于两者之间；(三) 每一套法律都仍然适用，都必须考虑到另一套法律。

55. 在此，关注的焦点是人权法在冲突情况中的适用性问题。尽管如此，应当牢记，主要适用武装冲突法/国际人道主义法的机构，如前南斯拉夫国际刑事法庭、卢旺达国际刑事法庭和红十字国际委员会，也可能需要考虑人权法继续适用的问题。[27] 互补是双向的。

56. 从 1968 年大会通过武装冲突中对人权之尊重问题的第二四四四(二十三)号决议以来，大会在有关冲突情况的各项决议中多次使用人权的措辞。[28] 近年来，安全理事会在冲突情况中越来越多地既提到人权法，也提到国际人道主义法。[29] 这也许可被认为表明政治上接受两种法律制度在同一情况中均可适用的事实。

57. 国际法院两次涉及这一问题，第一次是在关于使用或威胁使用核武器的合法性问题的咨询意见中，[30] 最近一次是在对被占巴勒斯坦领土修建隔离墙的法律后果发表的咨询意见中。[31] 在后一案件中，国际法院明确地涉及了在有关情况中适用的各种法律制度。法院确认了日内瓦四公约在法律上的适用性，然后考虑了人权法的适用问题。

> “从较为广义的意义上来说，本法院认为，人权公约提供的保护在武装冲突中并没有停止，除非因为《公民权利和政治权利国际公约》第四条所述的那种减损规定造成的结果。至于国际人道主义法律与人权法律之间的关系，因此，存在三种可能情况：某些权利可能专属于国际人道主义法律的事项：其他权利可能专属于人权法律事项：另外一些法律可能专属于国际法这两种分支的事项。为了回答所提出的问题，本法院必须考虑到国际法的这两种分支，即人权法律和作为特别法的国际人道主义法律。”[32]

很清楚，并不是用特别法取代人权法，而是表明，人权机构应当根据武装冲突法/国际人道主义法来解释人权准则。

国际条约机构

58. 国际条约机构本身必须考虑这一问题。由于篇幅的原因，仅有可能分析人权事务委员会以及经济、社会和文化权利委员会的意见。但是应当指出，其他条约机构也必须直接或间接地处理这一问题。[33]

59. 在提出咨询意见时，国际法院依靠并赞同人权事务委员会的现行做法。在克减方面，经常出现人权法与武装冲突法/国际人道主义法之间的关系问题。

60. 2001 年，人权事务委员会通过了关于紧急状态期间克减问题的第 29 号一般性意见。[34] 人权事务员会首先清楚地表明，在适用武装冲突法的情况中，《公约》可以适用。[35] 接着解释了其在有关可能与《公约》一道适用的其他法律制度方面的管辖权问题。[36]

61. 人权事务委员会还建议，在审查克减《公约》的特定措施的必要性之时，可以考虑到武装冲突法。[37] 这仍然没有说明人权事务委员会将如何看待一项符合武装冲突法却可能违反人权法的行为或措施。在这方面，最重要的问题是不可克减的禁止任意杀人(第六条)以及在一定情况下可以克减的禁止任意拘留(第九条)。就被拘

留者的权利而言，人权事务委员会认为，在关于不可克减的禁止酷刑、残忍、不人道或有辱人格的待遇或处罚方面，这些权利发挥着至关重要的作用。因此，人权事务委员会将一定情况下可以克减的第九条中的特定内容实际上视为不可克减。[38] 该一般性意见提出了此种原则运作的一个例子。[39]

62. 该一般性意见明确设想为了两个目的使用武装冲突法：确定一国是否被禁止采取一项特定措施，和确定一国希望在紧急情况中所采取措施的必要性。在这两种情况中，其效果都是确保遵守武装冲突法。该一般性意见提出，人权事务委员会可以在其管辖范围内处理任何指称的侵犯人权行为，甚至武装冲突情况中的侵权行为。意见没有解释人权事务委员会可以在多大程度上用武装冲突法来解释实体义务的范围；例如，确定什么构成任意杀人。当然，国际法院的咨询意见要求人权事务委员会，在确定在适用武装冲突法/国际人道主义法的情况中的杀人是否为任意杀人时，要考虑到武装冲突法/国际人道主义法。这一原则甚至在非国际武装冲突中也适用。

63. 经济、社会和文化权利委员会明显认为各国要对此种政策负责，即使是在适用武装冲突法/国际人道主义法的情况中也是如此，因为它要求以色列对在被占领土的政策负责。[40] 同样清楚的是，以色列主张，凡适用武装冲突法/国际人道主义法之处，武装冲突法/国际人道主义法取代人权法的适用。

国际特别程序

64. 许多任务授权涉及冲突情况中出现的问题，如酷刑；即决、任意和法外处决、任意拘留；国内流离失所者和失踪问题。国别任务授权目前包括或曾经包括阿富汗、伊拉克、苏丹、索马里、利比里亚和 1967 年以来的被占巴勒斯坦领土。有关冲突情况的国别任务授权报告以及提到这些任务授权的大会决议总是既提到人权法也提到武装冲突法，通常采用相当一般的措辞。[41]

65. 通常的情况是，任务授权执行人可以报告一项指称和政府的解释，但却因为事实有争议而不能得出结论。但是，一项特别程序在这方面却有所不同。其任务授权的性质意味着可以得出结论，因为所称侵权涉及一项法律的适用，其存在无可争议。这项特别程序就是任意拘留问题工作组。

66. 在 2002 年的报告中，该工作组就关塔那摩湾的拘留问题提出了一般性意见(见 E/CN.4/2003/8)。[42] 其中说，毫无疑问，按照《日内瓦第三公约》第五条第二款规定，被拘留者的地位只能由法庭确定，而不能通过行政决定确定。换句话说，该工作组采用了武装冲突法/国际人道主义法。如果由法庭确定某一个人无权享有战俘地位，该人就受到《公民权利和政治权利国际公约》的保护，特别是其第九条和第十四条。[43] 该工作组明确地说，工作组无权确定被拘留者是否享有战俘地位。这一意见并不表明，第一，《公约》的规定是否与《日内瓦第三公约》的解释相关(例如《日内瓦第三公约》第五条之下的“主管法庭”的特性)，也不表明，就《日内瓦第三公约》取代《公民权利和政治权利国际公约》的适用问题而言，该工作组是否有任务授权，确保有关拘留符合《公约》。

67. 美国做出了答复(E/CN.4/2003/8/Add.1)。[44] 美国首先说，该工作组没有任务授权处理战争法问题。答复没有分析人权法可能对不受武装冲突法/国际人道主义法保护的被拘留者适用的问题。美国只是主张，有关情况适用武装冲突法/国际人道主义法，即使被拘留者不受有关规则的保护也是如此，因此，人权法不适用。

68. 之后，工作组需审查关塔那摩湾四名被拘留者的案件。[45] 工作组认定，有关拘留违反了《世界人权宣言》和《公民权利和政治权利国际公约》第九条。[46] 这表明，不受《日内瓦第三公约》保护的被拘留者将受到人权法的保护。

69. 因此，看来尽管有两个国家(以色列和美国)采取凡适用武装冲突法即不适用人权法的立场，但国际法院、国际条约机构和国际特别程序并不采取这一立场，并不认为这是一个“非此即彼”的问题。在适用武装冲突法的地方，人权法也可能适用，特别是在个人得不到前一套规则所提供的保护之处。从其对条约机构和特别程序的反应来看，大多数国家并不采取一种直截了当的“非此即彼”的立场，而有可能争论在特定情况下人权法的适用问题。

70. 有必要考虑，以色列和美国是否可以依赖“一贯反对原则”来主张，至少就这两国而言，武装冲突法/国际人道主义法的适用取代人权法的适用。首先就有一个难以确定有关学说能否在人权法领域适用的问题。还有其他一些案例，在具有人道主义性质条约的情况下，国际法通常规则的适用可能有所改动。[47] 更为根本的问题是，它们的反对立场是否历来如此，这一点存在非严重疑问。[48] 以色列和美国都没有做出任何保留或声明，在适用武装冲突法/国际人道主义法之处明确排除人权法

的适用。人们将不仅期望找到在批准时作出的保留，而且还希望找到对直接或间接涉及这一问题的有关一般性意见的反对。对美国而言尤其如此，美国批评第 24 号一般性意见，但没有就第 29 号和第 31 号一般性意见提出意见。而且，对一国武装部队的指令中提到人权法的适用，这看来并不符合一贯反对的立场。即使有关学说被认为适用，它也不适用于已获得了强制法地位的人权法的那些规定。

区域条约机构

71. 由于篇幅的原因，仅有可能讨论两个区域机构的案例法，即使这样也只能极为粗略地涉及。[49] 美洲人权委员会和人权法院根据《美洲人权公约》拥有管辖权。[50] 此外，美洲人权委员会根据《美洲国家组织宪章》和《美洲人权宣言》拥有管辖权。[51] 该委员会提出国别报告，其中许多涉及冲突的情况。美洲人权法院提出了两项有关冲突情况的咨询意见。[52] 在这方面，根据该《公约》提起的最重要的三桩案件是 Abella 案、[53] Las Palmeras 案 [54] 和 Bámaca Velásquez 案 [55] 。美洲人权委员会明确表示愿意适用武装冲突法/国际人道主义法的适用规则。美洲人权法院裁定，在解释《美洲公约》时，可以考虑日内瓦四公约的相关规定，但美洲人权委员会和美洲人权法院只能认定违反人权法，而不能认定违反武装冲突法/国际人道主义法。[56] 这看来表明，武装冲突法/国际人道主义法将作为分析一项公约权利的依据，而非仅仅被用来确认一项基于人权法的分析。

72. 前欧洲(人权)委员会及以前和现在的欧洲人权法院都处理过在国际武装冲突、[57] 高强度非国际武装冲突情况中 [58] 以及在──至少可以商榷──适用日内瓦四公约共同的第三条的情况中引起的指称违反《欧洲人权公约》的情况。[59] 此外，该法院现还在审理由于和平支持行动引起的案件。该法院从未提到武装冲突法/国际人道主义法的适用问题。有的时候，该法院说它意识到适用《公约》的情况，但却是联系适用人权法的情况这样说的。[60] 尽管如此，在某些情况中，有可能看出似乎意识到在武装冲突法/国际人道主义法之下要进行的一类分析。[61] 对《欧洲公约》而言，为什么需要考虑到武装冲突法/国际人道主义法，还有一条特殊的理由。在《公民权利和政治权利国际公约》第六条和第九条中，关于禁止非法杀人和非法拘留的条款措词是不同的。欧洲人权法院详尽地列出了可以动用可能致命武力的各种唯一的理由，和一个人可被拘留的各种唯一的理由。在这些情况下，如果不承认适用武

装冲突法/国际人道主义法，就会出现荒谬的结果，至少在国家没有做出克减的情况下。[62]

73. 到此为止的分析都假定武装冲突法/国际人道主义法适用。尽管在许多情况下这种法律的适用性及其哪些部分适用的问题很清楚，但却并非总是如此。根据有关情况是国际武装冲突、高强度非国际冲突或非国际性质的武装冲突，适用不同的规则。[63] 在确立武装冲突法/国际人道主义法的适用性方面，有两类不同的问题。第一类基本上是政治的。特别是在国内冲突情况中，各国常常不愿意承认日内瓦四公约共同第三条的适用性。第 29 号一般性意见表明，人权事务委员会意识到这一问题。[64]

74. 第二类困难更具根本性。怀疑武装冲突法/国际人道主义法的适用性可能有法律上的理由。在适用共同第三条的最低起限方面以及在该条与《日内瓦公约第二议定书》适用的接合部，最可能出现这一问题。还有其他一些引起困难的情况，例如，确定阿富汗冲突何时从国际冲突转为非国际冲突。[65]

75. 没有任何机构处理冲突的性质和武装冲突法/国际人道主义法在交战时的适用问题。尽管一般而言，一个条约机构或一项特别程序自然会清楚，武装冲突法/国际人道主义法是否适用、是否应作为特别法适用这一问题，但可能也有一些更难以确定的情况。

76. 案例法的倾向很清楚：

- 人权法在可能有所克减的前提下，在适用武装冲突法/国际人道主义法的情况中仍然适用；
- 在冲突情况、特别是在战场的情况中，人权机构应当参照作为特别法的武装冲突法/国际人道主义法来解释人权法的准则；
- 如果人权机构不考虑武装冲突法/国际人道主义法，则可能出现困难；
- 看来不大可能适用“一贯反对原则”，无论是在原则上还是在实际中；和
- 条约机构成员和相关的特别程序在认为需要的情况下应接受武装冲突法/国际人道主义法方面的培训，或应可以求助于武装冲突法/国际人道主义法的专门知识。[66]

77. 与同时适用武装冲突法/国际人道主义法相关，原则上没有理由区分国内和国际冲突。适用武装冲突法/国际人道主义法要么取代人权法的适用，要么不取代。

绝大多数证据表明并不取代。然而，国际和非国际冲突的区分可能取决于对下一个问题的解答。如果人权义务仅在国家领土范围内对一国有约束力，那么，武装冲突法/国际人道主义法和人权法都可能适用的唯一情况就是：第一，国内冲突；第二，国际武装冲突期间与国家领土内的行动有关。

三、人权法的域外适用性

78. 在许多情况下，在国家领土内发生的冲突情况中，可能出现人权法与武装冲突法/国际人道主义法之间的重叠。这不引起人权法的域外适用性问题。但是，还有其他一些情况，在这些情况中，据称一国武装部队在本国领土之外违反了人权法。一国武装部队可能涉及国际或非国际武装冲突，在东道国的同意之下，临时或长期地存在或作为和平支持行动的一部分而存在。换句话说，人权法域外适用性问题包括但不限于冲突的情况。其适用甚至不限于武装部队。其他的国家代理人，如外交人员，也可能在国家领土之外采取据称违反人权法的行为。

79. 那些质疑人权法在国家领土之外适用的人提出了三种不同的论据。第一个论据是，人权法仅仅是针对国家及其公民之间的关系而设计的。[67] 这一论据的困难在于，很明显，国家领土内的外国人也受到人权法的保护。[68] 又有人提出，国际法中有其他各种办法，保护外国人免遭一国的域外行为的侵害。[69] 但是，如果人权法在国家领土内对外国人适用，这就表明，他们并不因为外国属性而失去受人权法保护的理由。还有些人提出，适用人权法的有关特定情况是，一国在其领土内及其对个人或整个人口实施控制的性质。但是，如果一国在国家领土之外行使相同或相似性质的控制，那就没有理由据此作出区分。

80. 第二个论据涉及下列事实的影响：国家在从事域外军事活动之时没有对人权法做出克减。[70] 有人提出，这表明这种国家并不期望域外适用其人权义务。对于这一论据，有两个反对的理由。第一，各国没有做出克减并不意味着它们不被要求这样做，如果其希望获得有关好处。在直接引起这一问题的唯一一桩案件中，欧洲人权委员会认定，在有关国家此前没有做出克减的情况下，有关《公约》在国家领土之外适用，而且是整体适用。[71] 第二，各国一般不反对在军事领域之外的域外适用，例如外交官的行为或国家代理人实施的拘留行为。[72]

81. 第三个论据不仅涉及适用的一般原则，而且涉及人权法可能在域外适用的有关情况。有人提出，在法律和实践中都没有理由说，人权法在国家领土之外原则上不适用，但这些正是人权法适用的有关情况和在有关情况下在多大程度上适用的问题。[73]

82. 大多数人权条约中都载有一个条款，各国据此承担确保保护在其管辖范围内的人的有关权利。具体提法各有不同。[74] 因此，有关问题是，尽管指称的行为发生在国家领土之外，什么时候一个人在一国的“管辖范围内”？管辖涉及事实上或法律上的权力主张。权利可以是立法权、司法权或行政权。人权事务委员会在第 31 号一般性评论(2004 年)中说，“……缔约国必须尊重和确保在其权力范围内或者有效控制下的任何人享受《公约》所规定的权利。其中甚至包括不在缔约国领土上的一些人的权利。”[75] 可以根据三项标准来审查案例法：领土控制、对申诉人的控制和对造成指称侵权事项的控制。重要的是要强调，即使一桩案件事实上属于某一类别，这也可能并非人权机构决定的根据。

领土控制

83. 领土控制的形式可以是军事占领、控制而不占领、或临时控制。在军事占领的情况下，一国能够以在国家领土内相同的方式确保人权。[76] 人权事务委员会和欧洲人权法院指出，占领国对在被占领土保护人权负责。[77] 欧洲人权法院清楚地表明，国家的责任不仅包括其代理人的行为，而且包括所有官员的行为，正如在国家领土内一样。人权事务委员会的意见的根据是有关个人在占领国管辖范围之内，还是依照国家责任法，人权保护在占领国的责任范围之内，这一点并不清楚。[78]

84. 欧洲人权法院还承认一个在未被承认实体的事务中发挥重要作用、但可能在武装冲突法/国际人道主义法之下不被视为占领国的国家的责任。在 Ilascu and others 案中，欧洲人权法院认为俄罗斯对其武装部队在外德涅斯特的行为负责。[79] 在 Issa and others v. Turkey 案中，欧洲人权法院更进一步，设想了临时控制领土的可能性。[80]

85. 在由一国武装部队在和平支持活动中对一个特定地区负责之时，可能出现领土控制的问题。[81]

对申诉人的人身控制

86. 人权机构有一系列的很一致判例，认定某人如被一国代理人在该国领土之外拘留，此人就在该国的管辖范围之内。强调的是国家对被拘留者行使的控制，但这并不一定是有关决定的根据。因此，例如，在 Lopez Burgos 案中，人权事务委员会认定，申诉人的丈夫——原在阿根廷——在遭到乌拉圭保安部队酷刑之时，是在乌拉圭的管辖范围之内。[82] 关于美国部队在格林纳达干预行动期间拘留的人员，美洲人权委员会要处理到类似的问题。在 Coard and others 案中，该委员会认定，检验标准是有关人员是否在一国的权力和控制之下。[83] 对于关塔那摩湾的被拘留者，采用了类似的检验标准。[84] 美国反对该委员会行使管辖权，因为美国主张，有关情况受武装冲突法/国际人道主义法规范。同样，欧洲人权法院认定，一库尔德工人党领导人奥克兰从他在肯尼亚被置于土耳其保安部队的控制下的时间起就在土耳其的管辖范围之内。[85]

87. 人权事务委员会分析的依据并非拘留的事实。

> “《任择议定书》第一条提到‘受其管辖的个人’……并非指发生侵权行为的地点，而是指与侵犯公约所规定的任何权利相关的——无论其发生在何处——个人与国家之间的关系。”[86] (着重号为作者所加)

以上所考虑的案件涉及在拘留地点的受害者。欧洲人权法院在 Issa and others v. Turkey 案中赋予拘留以更广的含义。[87] 据称，申诉人的亲属完全在土耳其士兵的控制之下被到处转移。

88. 在拘留案中，受害者处于与侵权行为有关的管辖范围之内，此种侵权行为涉及拘留，如指称的非法拘留或指称的虐待。个人可能因某些原因而在一国的管辖范围之内，因另一些原因而在另一个国家的管辖范围之内。管辖并非全有或全无的问题。[88]

对实施所称侵权行为的控制

89. 在有些案件中，人权机构认定受害者在有关管辖范围之内，但这并不能够用以上所分析的各种理由来解释。其中两桩案件是美洲人权委员会的决定。第一桩案件涉及指称的美国入侵格林纳达期间对一所精神病院的轰炸。[89] 第二桩案件涉及

指称的在美国在巴拿马的行动期间不分青红皂白胡乱开火造成的伤亡。[90] 尽管《美洲宣言》中没有关于管辖权的条款，美国也没有提出域外管辖问题，但委员会却自动提出了管辖问题。委员会认定自己有权处理这一问题。

90. 欧洲的案件主要涉及外交人员的行为。这些案件并不涉及国家对外交房舍内发生的行为的责任。前(欧洲人权)委员会认定，国家代理人对所称侵犯申诉人权利的行为或决定所实施的控制就足以使申诉人在有关国家的管辖范围之内。[91] 也许 Issa 案中最初准予受理的决定作为此种原则的适用更好理解。Varnava and others 案中准予受理的决定是以拘留还是以其他某种原因为由并不清楚。[92]

91. 认识这些案件共性的一种办法是参考人权事务委员会在 López Burgos 案中的分析。[93] 换句话说，决定申诉人是否在国家管辖范围之内的，是有关个人、国家代理人和所称构成侵权的行为之间的关系。如果国家控制所称侵权行为的实施，如果曾经或应当预见到有关行为会使申诉人受害，则申诉人就是在有关管辖范围之内。[94]

92. 当然，很清楚：

- 在某些情况下，一国可能在人权法之下对国家代理人在国家领土之外的行为和不行为负责；
- 在军事占领的领土中，一国对所有官员、而不仅仅是对其自己人员的行为负责；
- 在另一些情况下，如果国家控制所称侵权行为的实施，如果曾经或应当预见到有关行为或不行为会使申诉人受到不利影响，国家就对国家代理人的行为或不行为负责。

应当指出，并非仅仅因为人权法适用就意味着人权法遭到违反。还有人提出，在武装冲突法/国际人道主义法适用的情况下，人权法就必须联系其他适用规则来解释。

四、进一步的问题

93. 还有各种各样特定的问题，本工作文件由于各种限制而无法处理，但这些问题可能被认为值得进一步研究。这些问题都涉及在武装冲突法/国际人道主义法也适用的情况下，人权法的适用问题，而非适用性的问题。其中包括

(a) 禁止任意杀人和保护生命权：

(一) 可以将个人作为目标的情况；

(二) 在计划攻击时需要采取的预防措施；

(三) 人权法中的成比例原则与武装冲突法/国际人道主义法禁止不分青红皂白的攻击和可能对平民造成不成比例伤害的攻击之间的关系；

(四) 在多大程度上有义务对杀人事件进行有效调查和在适用武装冲突法/国际人道主义法的情况中有关义务的范围；

(b) 禁止酷刑、残忍、不人道或有辱人格的待遇或处罚：

(一) 战争方法、武器和有关做法在多大程度上可能引起不人道待遇问题；[95]

(二) 武装冲突法/国际人道主义法所禁止的集体处罚在多大程度上能够被称为构成残忍或不人道的处罚；

(c) 失踪和战争中失踪：武装冲突法/国际人道主义法有关战争中失踪的义务与人权法预防、终止和调查失踪案件的义务之间是否有关系；

(d) 拘留：人权法有关拘留的义务，如得到人身保护令状的权利和聘请律师的权利在多大程度上适用于武装冲突法/国际人道主义法之下拘留的情况；

(e) 获得医疗照顾：武装冲突法/国际人道主义法关于获得医疗照顾的详细规定与人权法对医护人员的保护之间的关系；

(f) 获得补救的权利：获得补救的权利是否适用于冲突的情况及其影响。

其他可能的问题包括：

(g) 实施：

(一) 旨在防止侵权行为的措施；

(二) 在事件发生后执行有关规则的措施；

(h) 机构：

(一) 非政府组织与冲突情况；

(二) 人权高专办与国际人道主义法/武装冲突法；

(三) 其他机构问题。

94. 毫无疑问，还可以加上其他一些问题。

注

[1] A/59/2005, 21 March, 2005, paragraph 129.

[2] Ibid.

[3] Rosemary Abi-Saab, Human Rights and Humanitarian Law in Internal Conflicts. D. Warner (ed) Human Rights and Humanitarian Law, 1997. Kluwer Law International, pp. 122-123.

[4] Hans-Hoachim Heintze, On the relationship between human rights law protection and international humanitarian law, ICRC. December 2004, Vol. 86, No. 856, p. 798.

[5] John Dugard, Bridging the gap between HRsL and humanitarian law. The punishment of offender. International review of the Red Cross, No. 423, p. 445 – 453.

[6] Louise Doswald-Beck ， International and humanitarian law and the Advisory Opinion of the ICJ on the legality of the threat or use of nuclear weapons, ICRC, International Review of the Red Cross no 316, p 41.

[7] A/59/2005, paragraph 144.

[8] S/2004/567, S/RES/1366 (2001) op 10.

[9] Hans-Joachim Heintze ， Ibid, pp. 812,813.

[10] Walter Kälin, The struggle against torture, International Review of the Red Cross, No.324,p. 436.

[11] As stated by H.J. Heintze “Some obligations in HRsL treaties remain in force during armed conflicts. The result is ubdoubtedly a substantial overlap of both bodies of law. However, the response of legal opinion to this situation differs. Some authors argue against “advocating a merger of the two bodies of international law” and speak of the theory of complementarity. According to this theory, HRsL law and IHL are not identical bodies of law but complement each other and ultimately remain distinct. This is undoubtedly true, but the point is that they do overlap”.， ibid p. 794.

[12] George Abi-Saab, Whither the International Community? European Journal of International Law 9, 1998, p. 262 .

[13] Hans-Joachim Heintze, Ibid, p. 799.

[14] The “laws of war” has generally fallen disuse. The phrase runs the risk of giving the impression that the rules only apply where war has been declared. “War” is a technical legal term. It is of significance in a domestic legal context. A declaration of war may have the effect of triggering the applicability of certain legislation E.g. rules on trading with the enemy; it may also have an effect on certain clauses in insurance contracts. See generally, McNair & Watts, The Legal Effects of War, CUP, 4th Ed.， 1966. The international rules are, however, applicable by virtue of the existence of an

armed conflict, whether or not war has been declared; Geneva Conventions of 1949, common Article 2; Protocol I of 1977, Article 1.3. Historically, "international humanitarian law" was used to describe the rules on the protection of the victims of war, as opposed to the rules on the conduct of hostilities. Since 1977, when Protocol I to the Geneva Conventions of 1949 addressed both means and methods of warfare and rules on the protection of victims, many commentators have used "international humanitarian law" to include both the rules on the conduct of hostilities and those on the protection of victims. That is the practice of the ICJ, as evidenced for example, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment of 27 June 1986 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004 and of the International Committee of the Red Cross (ICRC). Others, including many armed forces, prefer the term the law of armed conflict to apply to both bodies of rules; E.g. UK Ministry of Defence, The Manual of the Law of Armed Conflict, OUP 2004.

[15] Special Procedures refer to any individual or body addressing a human rights issue which report to the Commission on Human Rights. They include Special Rapporteurs (thematic and country), Working Groups, Independent Experts and Representatives of the Secretary-General. The manner of their appointment is not relevant for these purposes.

[16] Rules the function or purpose of which was to regulate the conduct of fighting go back a very long way. They start with the code of Sun Tzu, which is over 2,400 years old; Sun Tzu, On the Art of War; http://www.kimsoft.com/polwar.htm. Every ancient religion, including the three major monotheistic religions, contains principles restricting the conduct of war, for example by limiting the legitimate targets of attack. In the Middle Ages, principles of chivalry also contributed to the development of rules. In other words, the origin of the rules predates the development of the sovereign State. It should also be noted that many societies where conduct is subject to customary law also have rules regulating the conduct of hostilities; E.g. ICRC, Spared from the Spear – relating to Somalia. From the middle of the nineteenth century there has been the development of treaty law, in spasmodic bursts. The Russian authorities, led by the Tsar, played a vital role in the formulation of treaties dealing with the means and methods of warfare; E.g. the Declaration of St Petersburg 1868; for all treaties, see the web-site of the ICRC: www.icrc.org. At the domestic level, a code which was to serve as a model for other States was issued under the orders of President Lincoln during the American Civil War. It is known by the name of its author – the Lieber Code; Instructions for the Government of Armies of the United States in the Field, 24 April 1863. At around the same time, the ICRC was established, as a private association under

Swiss law. It acted as a catalyst for the creation of treaties dealing with the protection of victims of war, in other words the wounded and sick, the shipwrecked and prisoners of war. The treaty-making culminated in a series of consolidating and up-dating treaties in 1899 and 1907. There was very limited development in treaty law between 1907 and 1939, notwithstanding significant changes in technology, such as aircraft and submarines. Texts were agreed, such as Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. Drafted by a Commission of Jurists at the Hague, December 1922 - February 1923 and a Treaty for the Limitation and Reduction of Naval Armaments, (Part IV, Art. 22, relating to submarine warfare). London, 22 April 1930; these texts were not in force during World War II. One significant text adopted in that period was the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. There were also further consolidating and up-dating treaties on the wounded and sick and prisoners of war, which appear to have made a significant difference on the western front of the European theatre of war in World War II. The judgment of the Nuremberg Tribunal, together with judgments adopted under Control Council Law No.10 in occupied Germany and those of the Tribunals in the Far East, helped to clarify the rules as they were in 1945. The principles affirmed in the Charter of the Nuremberg Tribunal were endorsed by the General Assembly; Affirmation of the Principles of International Law recognised by the Charter of the Nüremberg Tribunal. Resolution 95 (I) of the United Nations General Assembly, 11 December 1946. In 1949, again under the aegis of the ICRC, the four Geneva Conventions were adopted. The first three, which dealt with the wounded and sick, the shipwrecked and prisoners of war, consolidated and up-dated the previous law, in the light of recent experience. The fourth, the need for which had again been made clear during World War II, dealt with civilians in the power of an opposing belligerent and civilians in occupied territory. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 contained some provisions on occupation but those dealing with the relations between the occupying power and the civilian population were very rudimentary. The fourth Geneva Convention contains some provisions, in Part II, of application to civilian populations generally and principally concerning access to medical care; the bulk of the provisions, however, deal with civilians in the power of the other side. Until 1977, there had been no successful attempt to up-date the rules on the conduct of hostilities generally. This may have been partly attributable to the reluctance, after both the first and second world wars, to regulate a phenomenon which the League of Nations and later the United Nations were intended to eliminate or control. During this time the Hague Convention for the Protection of Cultural Property in the event of armed conflict was

concluded. In 1977 two Protocols to the Geneva Conventions of 1949 were adopted. Protocol I dealt with international armed conflicts. It up-dated provisions on the wounded and sick and, most importantly, formulated rules on the conduct of hostilities. The Protocol deals with the effects on land of land, aerial and naval warfare but does not otherwise address naval warfare. That area of law formed the object of study by a group of governmental experts and academics and resulted in the publication of International Institute of Humanitarian Law (Louise Doswald-Beck, ed.), San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Grotius Publications, CUP, 1995. Protocol II addressed high-intensity non-international armed conflicts and developed common Article 3 of the Geneva Conventions of 1949, the first treaty provision to address conflicts not of an international character. In 1980 a convention on certain conventional weapons was adopted. It is usually known as the CCW. Its full title is Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980. The most recent addition to the protocols addresses explosive remnants of war. The Convention was essentially an umbrella, under which sheltered Protocols on certain specific conventional weapons. Since 1990 there have been developments in treaty law and outside that framework. The former include further protocols to the CCW, the modification of the treaty itself to apply in situations both of international and non-international conflict, the Ottawa Convention on anti-personnel mines of 1997, a second protocol to the Hague Convention on Cultural Property, making the Convention applicable in situations of non-international conflict and the adoption of the Statute of the International Criminal Court. It is not enough that treaties are concluded if they are not then ratified. The four Geneva Conventions of 1949 have achieved nearly universal ratification. Protocol I of 1977 has been ratified by over 160 States and Protocol II by nearly 160 States. Nearly 100 States are parties to the 1980 CCW. Mere numbers are not necessarily significant. The Protocols have been ratified by certain specially affected States, such as France, the Russian Federation and the UK but not ratified by others, such as Iran, Iraq, the PRC and the USA. It is also necessary to remember that ratification is not necessarily accompanied by implementation, in law or in practice. Outside the treaty-making framework, the most important development has been the case-law generated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which have provided a model for other bodies, such as the Special Court in Sierra Leone. Finally, 2005 has seen the publication of the ICRC study on customary IHL ; Henckaerts & Doswald-Beck, Customary International Humanitarian Law, 2 vols., CUP, 2005. The ICRC was mandated to produce the study by a resolution of the 26th International Conference of the Red Cross and Red Crescent

in 1995. Weapons of mass destruction, such as chemical, biological and nuclear weapons, are dealt with not as LOAC/IHL issues but are the subject of negotiation in the UN disarmament process.

[17] E.g. "Members of the armed forces of a Party to a conflict … are combatants, that is to say, they have the *right* to participate directly in hostilities."; Protocol I, Article 43.2 (emphasis added).

[18] International Covenant on Civil and Political Rights, Article 6.

[19] See generally, HRC General Comment 31, The nature of the general legal obligation imposed on States parties, CCPR/C/21/Rev.1/Add.13, 29 March 2004.

[20] E.g. *Trial of Pakistani Prisoners of War (Pakistan v. India*); by decision of 15 December 1973, the case was removed from the list. The treaty law relating to international conflicts envisages the possibility of inter-State civil claims; e.g. Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 3; Protocol I of 1977, Article 91.

[21] The enforcement provisions of the four Geneva Conventions are worded in the same way mutatis mutandis. By way of example, the enforcement provisions of the first Convention provide, "Art. 49. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

…

Art. 52. At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

…

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay." Protocol I of 1977 builds on the earlier provisions by providing additional "grave breaches". In addition, it spells out the responsibility of commanders for the enforcement criminal matters and for co-operation in enforcement (Articles 88 and 89).

[22] Kalshoven, F., State Responsibility for Warlike Acts of the Armed Forces, 40 ICLQ (1991) 827; see also the contributions of Kalshoven, David and Greenwood in H. Fuijta, I. Suzuki, K. Nagano (eds), War and Rights of Individuals, Nippon Hyoron-sha Co, Ltd. Publishers, Tokyo, 1999. There are usually two different types of problem with such claims. First, if claiming against the offending State, the claim will have to be brought in its own courts. Before the courts of other States, the claim would hit the barrier of sovereign immunity; *Al-Adsani v. the United Kingdom,* 35763/97, ECHR, judgment of 21 November 2001; with regard to claims brought against individual State agents, as opposed to the State itself, see Foakes & Wilmshurst, State Immunity: the United Nations Convention and its effect, Chatham House, ILP BP 05/01, May 2005. In many States, rules of domestic law on jurisdiction prevent foreigners bringing claims arising out of the extra-territorial conduct of their armed forces. Second, it is common, at the end of an international conflict, for States to make arrangements for compensation. It is possible that such arrangements will provide for claims to be brought by individuals; e.g under the United Nations Compensation Commission, which deals with claims arising out of the Iraqi invasion and occupation of Kuwait. Where that is not the case, if there were an independent possibility of individual claims, States would not, by their agreement, be able to determine once and for all their reciprocal commitments. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (E/CN.4/RES/2005/35), recently adopted by the Commission, need to be understood against this background. Certain States have reservations as to the applicability of the Basic Principles to violations of LOAC/IHL.

[23] There are other reasons why individuals bring claims, such as obtaining vindication of what they have claimed occurred, where the State is denying the applicant's version of events, or in an attempt to obtain the truth or to secure accountability.

[24] A trust fund is to be established for the benefit of victims of crimes under Article 79 of the Statute.

[25] E.g. Suter K.D., "An enquiry into the meaning of the phrase "Human Rights in Armed Conflicts", Rev. de Droit Pénal Militaire et de Droit de la Guerre, XV (3-4), 1976, p.393; Meyrowitz H., "Le Droit de la guerre et les droits de l'homme", Rev. du Droit Public et de la Science Politique en France et à l'Etranger, 5, 1972, p.1059.

[26] E.g. Meron T., Human Rights in Internal Strife: Their International Protection, CUP, 1987; Human Rights and Humanitarian Norms as Customary Law, OUP, 1989.

[27] See for example the use made of human rights in the case of *Tadic,* (IT-94-1) Interlocutory Appeal on Jurisdiction, Appeal Chamber, ICTY, 2 October 1995; on the usefulness of HRsL for the ICRC, see Pejic J., The Law of Armed Conflict: Problems and Prospects, Chatham House, 18-19 April 2005, summary of proceedings, pp.42-45.

[28] Human Rights in Armed Conflicts. Resolution XXIII adopted by the International Conference on Human Rights. Teheran, 12 May 1968.

[29] E.g. Resolution 1592 on the Situation concerning the Democratic Republic of Congo, S/RES/1952 (2005), adopted on 30 March 2005.

[30] ICJ, Advisory Opinion, July 8, 1996, para.25.

[31] ICJ, Advisory Opinion, 9 July 2004.

[32] Ibid, para.106.

[33] An article and a protocol to the Convention on the Rights of the Child expressly address an issue which arises in situations of conflict – the conscription or recruitment of child soldiers and their participation in conflict; Convention on the Rights of the Child, Article 38 and second optional protocol. The Convention against Torture addresses a phenomenon that is prohibited in all circumstances. LOAC/IHL prohibits the infliction of torture or cruel or inhuman or degrading treatment or punishment in both international and non-international conflicts. In the case of CEDAW, CERD and the Convention on Migrant Workers, the treaty bodies may have to address the issue indirectly.

[34] CCPR/C/21/Rev.1/Add.11. To the best of the author's knowledge, no State has commented on the General Comment. This is in contrast to the situation after the HRC adopted General Comment 24 on reservations to human rights treaties. Three States, France, the UK and the USA, criticised certain paragraphs in that General Comment. Where a State does not object to a General Comment, especially where that particular State has in the past criticised a General Comment, that may be thought to imply, if not approval, at least non-objection. This is particularly important in the case of General Comments 29 and 31; see further below.

[35] "The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation."; ibid, para.3, emphasis added. The immediately preceding sentence makes it clear that "armed conflict" is being used to describe a situation in which LOAC is applicable; "During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers." Dennis, in the context of an article disputing the extra-territorial applicability of HRsL, cites evidence from the negotiating record with regard to ICCPR Article 4 which in fact supports the

continued applicability of non-derogable HRsL in time of war. States were expressly trying to ensure that the article was consistent with the general international rules regarding the non-applicability of legal obligations in time of war, unless the obligation provided for continued applicability. The UK legal adviser suggested that the purpose of Article 4 was to prevent States from arbitrarily derogating from human rights obligations "in time of war". War, unlike armed conflict, is a technical term and can only exist between two States. The annotation prepared by the Secretary-General again suggested that the function of Article 4 was to make express provision for limited continued applicability "in time of war". This evidence does not address extra-territorial applicability but continued applicability in situations of conflict. Dennis M., "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", 99 AJIL (2005) p. 119 at pp.137-8.

[36] "Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant."; ibid, para.10.

[37] "As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations."; ibid, para.16.

[38] "In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."; ibid, para.16.

[39] Ibid, Footnote 9 in para. 16 states in part "See the Committee's concluding observations on Israel (1998) (CCPR/C/79/Add.93), para. 21: "… The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency … . The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention." It should be noted that certain States, whilst not apparently objecting in principle to the possible applicability of the two legal regimes, have objected to particular manifestations of it. So, for example, the Netherlands objected to attempts by the HRC to raise events in Srebrenica; UN Doc. CCPR/CO/72/NET/Add.1, para. 19 (2003) cited in Dennis; note 35, p.125, footnote 47. This is a particularly interesting case because it is not clear that LOAC/IHL is applicable in peace support operations.

[40] ICJ, note 31, para.112 – the Court expressly endorsed the Committee's view.

[41] E.g. Report of the Special Rapporteur (Mr. Felix Ermacora) on the Situation of Human Rights in Afghanistan, A/49/650, November 8, 1994; Situation of Human Rights in Afghanistan, General Assembly Resolution A/RES/49/207, March 6, 1995. See also, Report of the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions, E/CN.4/2004/7, December 22, 2003, paras. 26-32; specific situations referred to include belligerent occupation (Israel and the Occupied Territories) and international armed conflict (military operations in Iraq in the spring of 2003, which at some point became a military occupation), as well as internal conflicts; Report of the Independent Expert on the situation of human rights in Afghanistan, Mr. Cherif Bassiouni, E/CN.4/2005/122, 11 March 2005; the Report of John Dugard, the Special Rapporteur on the Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, E/CN.4/2004/6, September 8, 2003, which refers to particular principles of both HRsL and IHL; Report of the Independent Expert on the question of the protection of human rights and fundamental freedoms while countering terrorism (Mr. Robert K. Goldman), E/CN.4/2005/103, 7 February 2005. The Special Rapporteurs on Extra-Judicial, Summary or Arbitrary Executions routinely include in the reports references to the law of armed conflicts, as well as to human rights law. The difficulties which arise in relation to this particular mandate from a failure to take into account LOAC/IHL are illustrated by a comment of a former Special Rapporteur; "Governments must not resort to aerial bombing, use of snipers or pre-emptive strikes. The international community should take note of this growing tendency to use excessive force; " E/CN.4/2004/7, December 22, 2003, para. 96.2.

[42] Report of the Working Group on Arbitrary Detention, (E/CN.4/2003/8), December 16, 2002, paras. 61-64. Two separate issues have been of concern to the Working Group: detentions within the USA after 9/11 effected under powers under immigration law and detentions in Guantanamo Bay. The discussion here concerns only the latter category. The United States has provided information in the case of at least some persons detained within the United States; E/CN.4/2004/3/Add.1, p.20, opinion 21/2002. This suggests that it is deliberately drawing a distinction between the two categories of detainees.

[43] The United States has ratified the International Covenant on Civil and Political Rights. It has not entered a notice of derogation in relation to its activities since 9/11. On the implications of a failure to derogate, see further below.

[44] Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights, E/CN.4/2003/G/73, 7 April 2003.

[45] Opinion 5/2003, Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2004/3/Add.1, 26 November 2003, pp.33-35; the Opinion was adopted on 8 May 2003. The British position, in relation to those detained in Iraq, is significantly different from that of the US. The UK acknowledges the applicability of the UDHRs to all detainees. It expressly rejects the idea that PoWs and security detainees have protection under human rights treaty law, notably the ICCPR. It does not do this on the basis that the situation is one in which LOAC/IHL is applicable but rather on the basis that those particular detainees are recognised as being protected by Geneva Conventions III and IV and those protections are being afforded them. It did not appear to reject the applicability of the ICCPR to criminal detainees. This approach, unlike that of the US, is consistent with that taken by the ICJ. See generally Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6, 1st December 2004, especially at paras. 6-9. See also the UK's 4th periodic report to CAT, the list of issues, the statement, the response and the concluding observations. It is not clear whether the UK accepts the scrutiny of human rights mechanisms to ensure that the rights under the Geneva Conventions are being respected.

[46] Opinion 5/2003, Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2004/3/Add.1, 26 November 2003, pp.33-35, para.12. The US refused to provide information about the four cases, interestingly apparently citing reasons of national security rather than lack of jurisdiction; Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3, 15 December 2003, para.19.

[47] E.g. Vienna Convention on the Law of Treaties, Article 60.5, dealing with the consequences of a material breach.

[48] The US Operational Law Handbook 2004 (Berger, Grimes & Jensen, Eds.) contains a chapter dealing expressly with human rights law. It finds those rules of HRsL which represent customary international law to be applicable to US armed forces, including when acting extra-territorially. It states that, for reasons of domestic US law, because the treaties are not self-executing, treaty obligations are not applicable extra-territorially; see further below. In its second periodic report to CAT, 6 May 2005, the US explains the steps it has taken to give effect to its obligations, including in relation to detainees in Iraq, at least some of whom were clearly protected under LOAC/IHL. There is no suggestion that CAT has no jurisdiction on account of the applicability of LOAC/IHL; http://www.state.gov/g/drl/rls/45738.htm#additional.

[49] The African Commission on Human and Peoples' Rights has addressed situations of conflict. The African Charter does not contain a derogation clause but the Commission takes the situation in a State into account when dealing with individual applications or country missions.

[50] OAS.Treaty Series No. 36, 1144 UNTS123, entered into force July 18, 1978.

[51] 119 UNTS 3, entered into force December 13, 1951; amended by Protocol of Buenos Aires, 721 UNTS 324.

[52] Habeas corpus in emergency situations, Advisory Opinion OC-8/87 of January 30, 1987 and judicial guarantees in states of emergency, Advisory Opinion OC-9/87 of October 6, 1987.

[53] *Abella v. Argentina,* Case 11.137, Report Nº 55/97, Inter-Am.C.H.R. , OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997).

[54] *Las Palmeras v. Colombia,* Preliminary Objections, Judgment of February 4, 2000.

[55] Judgment of November 25, 2000, Inter-Am Ct. H.R. (Ser. C) No. 70 (2000).

[56] Ibid, para. 209.

[57] They include the four inter-State cases brought by Cyprus against Turkey, the individual applications brought against Turkey arising out of its occupation of northern Cyprus and arguably Part III, section II of the fourth Geneva Convention was applicable to the facts in *Issa and others v. Turkey,* 31821/96, admissibility decision of May 30, 2000; decision of second Chamber, 16 November 2004; see also *Bankovic and others v. Belgium and 16 other members of NATO,* 52207/99, Admissibility Decision of 12 December 2001.

[58] *Isayeva, Yusupova and Bazayeva v. Russia*, 57947/00, 57948/00 and 57949/00, judgment of 24 February 2005 and two other cases involving three applicants in which judgment was given on the same day. The cases concern incidents which arose during military operations in Chechnya. The Russian Constitutional Court has determined that the situation falls within Protocol II to the Geneva Conventions; Judgment of the Constitutional Court of the Russian Federation of 31 July 1995 on the constitutionality of the Presidential Decrees and the Resolutions of the Federal Government concerning the situation in Chechnya, European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1.

[59] E.g. at certain times the situation in Northern Ireland and south-east Turkey; the governments in question denied that the situation constituted an “armed conflict”.

[60] E.g. *Brogan & others v. UK*, ECHR, 11209/84, 11234/84, 11266/84, judgment of November 29, 1988 and Aksoy *v. Turkey,* ECHR, 21987/93, judgment of December 18, 1996, on periods of detention when investigating terrorist crimes; *Kaya v. Turkey*, ECHR, 22729/93, judgment of February 19, 1998, on carrying out autopsies in situations of conflict.

[61] The fact that this occurs in some cases but not others raising a very similar issue suggests that whether LOAC/IHL is used may depend on the individual judge or member of the secretariat responsible for the case e.g. contrast *Ergi*, ECHR, 23818/94, judgment of July 28, 1998 where the legal issue was handled consistently with

LOAC/IHL and *Ozkan & others,* ECHR, 21689/93, judgment of April 6, 2004, where no attention at all appears to have been paid to LOAC/IHL; see paras. 103-6 & 305-6. In the Chechen cases, note 58, the ECHR appears to have used a law enforcement test, rather than a LOAC/IHL test in para. 171 but it did take into account the need for precautions in attack. It is not clear whether in non-international conflicts a party can target the fighters of the other side without the need for them to be posing a threat. In international conflicts, combatants can be targeted at any time. It is not clear whether that is also the case for civilians taking a direct part in hostilities in a non-international conflict, particularly since they can only be targeted for such time as they are participating.

[62] In the first two cases brought by Cyprus against Turkey, the Commission determined that, as Turkey had not derogated, the only grounds for detention were those set out in Article 5 of the Convention. This meant that the detention of PoWs was unlawful; 6780/74 & 6950/75, Report of the Commission, adopted on 10 July 1976; two members of the Commission suggested that LOAC/IHL became applicable by virtue of the facts and should have been taken into account with or without derogation.

[63] See history, note 16 above.

[64] Note 34 and accompanying text.

[65] In the case of the initial American operations in Afghanistan in October 2001, there is no doubt that there was an international armed conflict between the USA and its allies and the Afghan authorities (the Taliban), assisted by Al Qaida. Common Article 2 of the Geneva Conventions 1949 makes it clear that it is not necessary for a State to recognise its opponent as the legitimate authority; it is sufficient for it to be the de facto authority in control of the State. There was presumably, at the same time, a non-international conflict between the Taliban and the Northern Alliance, unless the latter were fighting as part of the American armed forces. At some point, the American forces were present with the consent of the newly installed authorities. From then on, it would appear that there has been a non-international conflict between the US armed forces and the remnants of the Taliban and Al Qaida; Pejic J., "Terrorist Acts and Groups: A Role for International Law?", LXXV BYIL (2004), forthcoming, p.1. At the time of the drafting of common Article 3, it would appear that the negotiating parties assumed that the conflict occurred between a non-State party and the State whose territory it was; Pictet J. (Ed.) Commentary to the Geneva Conventions of 1949, 4 volumes, 1952,1960, 1960 and 1958, ICRC; commentary to common Article 3. There is nothing on the face of the provision, however, that precludes its applicability between a non-State group and a State operating with the consent of the territorial State. At what point did the conflict shift from being international to being

non-international; was it with the installation of President Karzai, with his endorsement by the Loya Jirga or only after elections? Similar difficulties arise in relation to Iraq. It started out as an international armed conflict and then a belligerent occupation. At what point did the coalition forces cease to be occupying forces or do they in fact remain occupying forces, if the notion of the consent to their presence of sovereign Iraqi authorities is something of an illusion? If an intense military operation occurs during a military occupation, as was the case at Falluja, is that subject to the law and order powers of the occupying power or to the provisions on the conduct of hostilities in Protocol I or customary law? The ICJ addressed the question in an ambiguous way in the Advisory Opinion on the Wall, note 31 at para. 124. It is not clear whether the Court was saying that, at the relevant time, the provisions on the conduct of hostilities were not applicable on the facts or whether it was suggesting that, as a matter of law, once territory is occupied the rules on the conduct of international operations are no longer applicable, presumably meaning that they must take place in accordance with the law and order authority of the occupying power. Further problems arise in the case of isolated individual attacks, such as the attack in Yemen by the American predator drone; Pejic, art. cit., pp. 17-18. It may have been an armed attack but did it constitute an armed conflict?

[66] LOAC/IHL treaties are not drafted in the same way as HRsL and cannot be interpreted in the same way. The *Abella* case, note 53, shows that a human rights body is perfectly capable of applying LOAC/IHL properly, when it has the requisite expertise.

[67] US Operational Law Handbook (2004), note 48, pp. 48-49; Dennis M., note 35.

[68] In addition to general comments 15 and 31 and the case-law before human rights bodies, there is a human rights treaty designed to protect foreigners, the International Convention on the Protection of the Rights of all Migrant Workers.

[69] Under the law of state responsibility, States are responsible to other States for the treatment of nationals of the other. This is not based on the individual rights of the victim but rather treats the individual as a species of state property.

[70] *Bankovic*, note 57; Dennis, note 35.

[71] *Cyprus v. Turkey*, note 62.

[72] In the second US periodic report to CAT, note 48, the US sets out the measures it has taken to protect detainees in Afghanistan and Iraq. The UK accepted the applicability of HRsL to common criminals in Iraq in its dialogue with the Working Group on Arbitrary Detention, note 45. The 17 respondent Governments in the case of *Bankovic*, note 57, stated that the Convention was applicable to persons detained outside national territory; para. 37.

[73] The case-law will be examined in the context of that particular question. The totality of the case-law represents the evidence that applicability of HRsL extra-territorially cannot be rejected in principle. It should also be noted that the ICJ Advisory Opinion, note 31, concerned the applicability of HRsL outside national territory, in territory occupied by Israel. The issue of the circumstances in which a person outside national territory is nevertheless within the jurisdiction for the purposes of HRsL specifically in the context of military operations is the subject-matter of litigation in various States, including Italy and the Netherlands. In the case of the UK, such an issue has arisen in relation to deaths at the hands of British armed forces in Iraq during the period of military occupation; *Al-Skeini et al. v. Sec. of State for Defence*, [2004] EWHC 2911; both sides are appealing the decision of the High Court.

[74] Under Article 2 of the ICCPR, a State undertakes to respect and ensure the rights of "all individuals within its territory and subject to its jurisdiction". The HRC has in recent times interpreted "and" disjunctively; general comment 31, note 19. Article 2 of CAT provides that States will take measures to prevent "acts of torture in any territory under its jurisdiction"; it is unusual in that the focus is not on the individual victim. Article 22 of CAT provides for petitions from "individuals subject to its jurisdiction". There is no analogous provision in the CESCR, but the Committee has interpreted the Covenant as applying to an occupying power in occupied territory, a view which has been endorsed by the ICJ. Under Article 1 of the American Convention, States undertake to respect the rights of "all persons subject to their jurisdiction". There is no general jurisdictional clause in the African Charter on Human and Peoples' Rights. The Protocol establishing the African Court defines the jurisdiction of the Court but not that of the High Contracting Parties. Under Article 1 of the ECHR, States undertake to "secure to everyone within their jurisdiction" the rights under the Convention.

[75] Note 19, para.10.

[76] This is subject to a significant qualification. Under LOAC/IHL, an occupying power is not allowed to change the law in place in the territory, except where it is necessary to do so for its own security; Hague Convention IV (1907), annex Article 43; Geneva Convention IV, Article 64. In a situation of military occupation, by definition the territory "is actually placed under the authority of the hostile army" and "[t]he occupation extends only to the territory where such authority has been established and can be exercised"; Hague Convention IV (1907), Annex, Article 42; emphasis added.

[77] HRC Concluding Observations on Periodic Reports of Israel, UN Doc.CCPR/C/79/Add.93, para.10 ; CCPR/CO/78/ISR, para. 11 ; of Syria, CCPR/CO/71/SYR, para. 10 and of Morocco CCPR/C/79/Add.113, para.9 and CCPR/CO/82/MAR, 1 December 2004, paras. 8 & 18; ECHR: the inter-State litigation between Cyprus and Turkey culminating in 25781/94, judgment of 10 May 2001 and the individual applications against Turkey arising out of the situation in northern Cyprus such as the case of *Loizidou,* ECHR, 15318/89, judgment of 18 December 1996.

[78] Contrast concluding observations on the third and fourth periodic reports of Israel, note 77. In the third report, the HRC pointed to "… the long-standing presence of Israel in these territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein"; para.10, emphasis added. In the fourth report, the HRC stated "… the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's 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"; para.11, emphasis added.

[79] *Ilascu & others v. Moldova & the Russian Federation,* with Romania intervening, ECHR, 48787/99, Judgment of 8 July 2004; the view of the Court may have been affected by the fact that Russian forces were responsible for the original act of detention.

[80] ECHR, 31821/96, admissibility decision of May 30, 2000; decision of second Chamber, 16 November 2004.

[81] *Behrami v. France,* 71412/01, ECtHR, 16 September 2003; the case has been communicated to the French government. One child was killed and another injured when a cluster weapon exploded in the French area of operations in Kosovo; see generally HRC, General Comment 31, note 19.

[82] HRC 29 July 1981, UN Doc.A/36/40, 176; Communication No.52/1979, CCPR/C/13/D/52/197.

[83] IACHR Report No. 109/99, Case No. 10,951, 29 September 1999, Ann. Rep. IACHR 1999.

[84] Center for Constitutional Rights; http://www.ccr-ny.org/v2/legal/september_11th/docs/3-13-02%20IACHRAdoptionofPrecautionaryMeasures.pdf.

[85] ECHR, 46221/99, judgment of 12 March 2003; Grand Chamber judgment of May 12, 2005, para.91. This decision postdates that in *Bankovic,* note 57.

[86] *Lopez Burgos,* note 82, para 12.2, emphasis added. This is further confirmed in the separate opinion of Mr. Tomuschat.

[87] Note 57.

[88] E.g. In the *Ilascu* case, note 79, different violations were found against Moldova and Russia; contra Bankovic, note 57.

[89] *Disabled Peoples' International et al v. United States,* Case 9213, Inter-Am. C.H.R. 184, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987) (Annual Report 1986-1987).

[90] *Salas and others v. the United States,* IACHR Report No.31/93, Case No. 10,573, 14 October 1993, Ann. Rep. IACHR 1993, 312.

[91] *X v Federal Republic of Germany* (Application No 1611/62; 25 September 1965), 8 Ybk ECHR, p.158 at 169; *WM v Denmark,* 17392/90, admissibility decision of 14 October 1992.

[92] *Varnava & others v. Turkey*, 16064/90 & others, admissibility decision of April 14, 1998.

[93] Note 82.

[94] Such a test has the additional advantage of being consistent with the law of State responsibility. It also ensures that applicants complaining of the same acts under the same control of the same State agents are treated in the same way, whether the harm occurs within or outside national territory. E.g. *Isiyok v. Turkey*, 22309/93, admissibility decision of 3 April 1995; friendly settlement of 31 October 1997; the alleged violation was the harm that resulted from aerial bombardment. It would seem somewhat strange if whether or not a victim is within the jurisdiction of a State depends on which side of the border the missile falls. It would also ensure that victims of aerial attack would be subject to the same jurisdictional criterion as victims of ground attack. If the test used is control of the victim, as opposed to control over the infliction of the alleged violation, ground forces may be found to be in control of the applicant, as in the *Issa* case, note 57, but it is difficult to see how airborne forces could be, even when that person is intentionally targeted. The difficulty with the admissibility decision of the ECHR in the case of *Bankovic*, note 57, is that it appears to make jurisdiction dependent on the colour of the uniform or on the type of weapon used.

[95] E.g. the common practice, prohibited under LOAC/IHL, of removing the ears of dead opponents as some form of trophy; e.g. *Akkum, Akan and Karakoc v. Turkey,* ECHR, 21894/93, judgment of March 24, 2005.

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