APPLICATION OF HUMAN RIGHTS TREATIES EXTRATERRITORIALLY TO DETENTION OF COMBATANTS AND SECURITY INTERNEES: FUZZY THINKING ALL AROUND?

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I. DOES EITHER INTERNATIONAL HUMANITARIAN OR HUMAN RIGHTS LAW COVER EXTRATERRITORIAL DETENTION DURING PERIODS OF ARMED CONFLICT? 461
  A. *Scope of Application Provisions of the ICCPR and ECHR* .. 462
  B. *Preparatory Work of ICCPR* 463
  C. *Subsequent Practice Concerning ICCPR* 464
  D. *Subsequent Practice Concerning ECHR* 468
  E. *Article 43 of the Hague Regulations* 470
II. IF BOTH HUMANITARIAN AND HUMAN RIGHTS LAW APPLY, DOES THE FORMER PREVAIL AS *LEX SPECIALIS*? 472
III. IF HUMAN RIGHTS LAW APPLIES, WHAT IS THE PERMISSIBLE SCOPE OF POSSIBLE DEROGATIONS? 475
  A. *Suspension of Rights Generally* 476
  B. *Permissible Scope of Derogations* 477
IV. IF ONLY HUMANITARIAN LAW APPLIES, WHAT CONSTRAINTS DOES IT IMPOSE ON DETENTIONS? 479
V. CONCLUSION 480

The issue before our panel today is a subpart of a larger question: Are obligations assumed by states under international human rights treaties applicable extraterritorially during periods of armed conflict and military occupation? Do the protections provided by the international human rights treaties normally apply extraterritorially, outside the government-governed relationship? If so, what is the precise relationship between the protections provided under human rights instruments and international humanitarian law (the law of war) in cases of armed conflict or military occupation?

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Even though the atrocities committed during World War II served as a catalyst for the development of the International Covenants on Human Rights[1] as well as the Geneva Conventions of 1949, the linkage between human rights and humanitarian law has never been clear. The traditional view has been to distinguish the two: "the two systems are complementary," Jean Pictet observes, but "humanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime."[2] Proponents of this position have noted that the original paradigm of human rights governed relations between the state and its own nationals; on the other hand, the law of war dealt with those concerning the state and enemy nationals, and humanitarian law was intended primarily to protect enemy noncombatants. More recently, a conflicting school of thought has concluded that "[t]he conventional division between the law of war and the law of peace is no longer tenable" and that "the law of war no longer automatically excludes the application of the law of peace."[3] Last year, the International Court of Justice indicated in its advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[4] that the provisions of the Covenants and the Convention on the Rights of the Child[5] applied extraterritorially during military occupation and that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the provisions for derogation of the kind to be found in Article 4 of the [ICCPR]."[6]

In my view, this comment by the Court is not consistent with state practice concerning the application of human rights treaties extraterritorially during times of armed conflict and military occupation.[7] For example, during the

1. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 3 [hereinafter the Covenants].

2. JEAN PICTET, HUMANITARIAN LAW AND PROTECTION OF WAR VICTIMS 15 (1975).

3. Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationships of the Laws*, 31 AM. U. L. REV. 935, 941–42 (1982).

4. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, July 9, 2004, 43 I.L.M. 1009 [hereinafter Wall Opinion].

5. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3

6. Wall Opinion, *supra* note 4, ¶ 106.

7. The provisions of the two bodies of law may overlap when armed forces act solely within their own territory in domestic armed conflict, since common Article 3 of the four Geneva Conventions and Additional Protocol II of 1977 apply to a state's own nationals, as well as the international human rights treaties. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31, 32; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 75 U.N.T.S. 85, 86; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135, 136 [hereinafter Third Geneva Convention]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75

recent military occupation of Iraq, the Commission on Human Rights called upon parties only "to abide strictly by their obligations under *international humanitarian law*, in particular the Geneva Conventions and the Hague Regulations including those relating to essential civilian needs of the people of Iraq."[8] Similarly, in Resolution 1483, the Security Council, acting under Chapter VII of the Charter, called upon "all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."[9] Subsequently, in Resolutions 1511 and 1546, again acting under Chapter VII of the Charter, the Security Council authorized the multinational force "to take all necessary measures to contribute to the maintenance of security and stability in Iraq."[10] Both resolutions also refer to the obligation of states to comply with international humanitarian law. However, no mention is made of any obligation on the part of states to comply with international human rights instruments. During the briefing and argument of the *Wall* case, most states addressed only jurisdictional issues, while a few summarily argued that Israel had violated the Covenants, without substantively addressing the relationship between the two bodies of law.

The Chairperson of our panel has posed several excellent questions concerning the applicable law with regard to extraterritorial detention during periods of armed conflict and military operation. I will use those questions as a framework for my presentation this morning.

I. DOES EITHER INTERNATIONAL HUMANITARIAN OR HUMAN RIGHTS LAW COVER EXTRATERRITORIAL DETENTION DURING PERIODS OF ARMED CONFLICT?

As indicated above, states have considered the extraterritorial detention of individuals during armed conflict or military occupation to be covered by international humanitarian law. It is generally acknowledged that "[t]he humanitarian law conventions offer far more protection than do the general

U.N.T.S. 287, 288 [hereinafter Fourth Geneva Convention] [collectively Geneva Conventions]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 1125 U.N.T.S. 3 (hereinafter Protocol I), and Protocol;24005;24005 Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609 (hereinafter Protocol II) [collectively Additional Protocols of 1977].

8. C.H.R. Res. 84, U.N. Doc. 2003/84 (Apr. 25, 2003). For the relevant instruments concerned, *see* Geneva Conventions, *supra* note 7, and the Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

9. S.C. Res. 1483, ¶ 5, U.N. Doc. S/RES/1483 (May 22, 2003).

10. S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003); S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004).

guarantees of the human rights conventions."[11] For example, with respect to detention, the protections in international human rights instruments generally focus on restrictions to freedom following a criminal offence, where a final decision has not been made in such cases by domestic courts. On the other hand, these protections are defined in a far more precise manner in international humanitarian law instruments for persons detained in situations of armed conflict or military occupation. The Third Geneva Convention, as well as the customary law of armed conflict, provides specific guidance concerning the treatment of prisoners of war and enemy combatants, while the Fourth Geneva Convention provides detailed rules concerning internment of civilians of enemy nationality. Moreover, if international human rights treaties apply extraterritorially, then the possibility of conflict with international humanitarian law is all the greater. For example, Article 5 of the European Convention on Human Rights (ECHR) lists the cases when a person may be deprived of liberty, but fails to mention the capture of prisoners of war or the internment of civilians.[12]

The two human right instruments that are most relevant to our inquiry concerning the application of human rights law to extraterritorial detention are the ICCPR (with 155 states parties) and the ECHR (with forty-five states parties). This presentation assumes that the relevant criteria for ascertaining whether the standards set forth in these instruments apply to extraterritorial detention must begin with the ordinary meaning of each instrument in its context and in light of its object and purpose, its preparatory work, and state practice thereunder—in short, the standard tools of treaty interpretation as set forth in the Vienna Convention on the Law of Treaties.[13]

A. Scope of Application Provisions of the ICCPR and ECHR

While both the ECHR and the ICCPR reflect a territorial notion of jurisdiction, their specific scope of application is different. Article 1 of the ECHR states that "the High Contracting Party shall secure to everyone *within their jurisdiction* the rights and freedoms defined in section 1 of the Convention." On the other hand, Article 2(1) of the ICCPR stipulates that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant without discrimination of any kind."

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11. Schindler, *supra* note 3, at 940.

12. European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

13. Vienna Convention on the Law of Treaties, May 23, 1969, art. 32, 1155 U.N.T.S. 331. While the U.S. is not a party to this Convention, the principles for treaty interpretation are recognized as part of customary international law.

Hence, on the basis of the plain and ordinary meaning of the scope of application provisions, the reach of the ECHR would appear to be broader than that of the ICCPR. The ECHR applies to anyone within the jurisdiction of a state, while the ICCPR applies to individuals who are both within its territory and subject to its sovereign authority.

B. Preparatory Work of ICCPR

What was the reason for the difference in the scope of application provisions of the two instruments? The preparatory work of the Covenant actually establishes that the reference to "within its territory" was included in Article 2(1) in part to make clear that states were not obligated to secure the rights therein in territories under military occupation. In 1950 the draft text of Article 2 then under consideration by the Commission on Human Rights, like Article 1 of the European Convention on Human Rights, would have required that each state ensure Covenant rights to everyone "within its jurisdiction." The United States, however, proposed the addition of "within its territory."[14] Eleanor Roosevelt, the U.S. representative and then-chair of the Commission, emphasized that the United States was "particularly anxious" that it not assume "an obligation to ensure the rights recognized in it to the citizens of countries under United States occupation" or in what she characterized as "leased territory."[15] She explained:

> The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without [the proposed] addition the draft Covenant might be construed as obliging the contracting State[ ] to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying States in certain respects, but were outside the scope of legislation of those States. Another illustration would be leased territories; some countries leased certain territories from others for

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14. *Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles*, U.N. ESCOR Hum. Rts. Comm., 6th Sess. at 14, U.N. Doc. E/CN.4/365 (1950) (U.S. proposal). The U.S. amendment added the words "territory and subject to its" before "jurisdiction" in Article 2(1). *Id.*

15. *Summary Record of the Hundred and Ninety-Third Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 193rd mtg. at 13, 18, U.N. Doc. E/CN.4/SR.193 at 13, 18 (1950); *Summary Record of the Hundred and Ninety-Fourth Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 194rd mtg. at 5, 9, U.N. Doc. E/CN.4/SR.194 (1950) (statements of Eleanor Roosevelt).

> limited purposes, and there might be a question of conflicting authority between the lessor nation and the lessee nation.[16]

Several delegations spoke against the U.S. amendment, including René Cassin (France) and Charles Malik (Lebanon). They argued that a nation should guarantee fundamental rights to its citizens abroad as well as at home.[17] However, the U.S. amendment was ultimately adopted at the 1950 session by a vote of 8–2 with five abstentions.[18] Subsequently, after similar debates, the United States and others defeated French proposals to delete the phrase "within its territory" at both the 1952 session of the Commission[19] and the 1963 session of the General Assembly.[20] As Egon Schwelb concludes:

> The words "within its territory" amount to a limitation of the scope of the Covenant in regard to which the Covenant differs, *e.g.*, from the European Convention on Human Rights, by Art. 1 of which the High Contracting Parties undertook to secure the rights "to everyone within their jurisdiction." Misgivings about this restriction were felt both in the United Nations Commission on Human Rights and in the General Assembly. In a separate vote on the words "within its territory" these words were retained, however.[21]

C. Subsequent Practice Concerning ICCPR

Initially, commentators endorsed a literal reading of Article 2(1), and further argued that Covenant obligations applied, in the context of armed conflict, only with respect to acts of a state's armed forces executed within that territory.[22] The Human Rights Committee first departed from this literal

16. *Summary Record of the Hundred and Thirty-Eighth Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 138th mtg at 10, U.N. Doc. E/CN.4/SR.138 (1950).

17. *See Summary Record of the Hundred and Ninety-Third Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 193rd mtg. at 21, U.N. Doc. E/CN.4/SR.193 (1950) (proposal by René Cassin (France)); *Summary Record of the Hundred and Ninety-Third Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 193rd mtg. at 7, U.N. Doc. E/CN.4/SR.193 (1950) (statement by Charles Malik (Lebanon)).

18. *Summary Record of the Hundred and Ninety-Fourth Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 194rd mtg. at 11, U.N. Doc. E/CN.4/SR.194 (1950).

19. *Draft International Convention on Human Rights and Measures of Implementation*, U.N. ESCOR Hum. Rts. Comm., 8th Sess., Agenda Item 4, U.N. Doc. E/CN.4/L.161 (1952) (French amendment); *Summary Record of the Three Hundred and Twenty-Ninth Meeting*, U.N. ESCOR Hum. Rts. Comm., 8th Sess., 329th mtg. at 14, UN Doc. E/CN.4/SR.329 (1952) (vote rejecting amendment).

20. U.N. GAOR 3rd Comm., 18th Sess., 1259th mtg. ¶ 30, U.N. Doc. A/C.3/SR.1259 (1963) (rejection of French and Chinese proposal to delete "within its territory").

21. Egon Schwelb, *Some Aspects of the International Covenants on Human Rights of December 1966*, *in* INTERNATIONAL PROTECTION OF HUMAN RIGHTS 103, 109 (Asbjorn Eide & August Schou eds., 1968).

22. *See, e.g.* Manfred Nowak, *The Effectiveness of the International Covenant on Civil and*

reading of Article 2(1) in several early decisions on individual communications (cited with approval by the International Court of Justice in its *Wall* opinion), where it found that it had jurisdiction in "exceptional instances" when state agents had taken unlawful action against *citizens* of that state living abroad.[23] However, these opinions support the position that the provisions of the ICCPR do not apply extraterritorially in situations of armed conflict and military occupation. In two of those cases (*López Burgos v. Uruguay* and *Celiberti v. Uruguay*), involving exceptional instances where Uruguayan state agents abducted citizens living abroad into Uruguayan territory, Committee member Christian Tomuschat observed that "[t]he formula [within its territory] was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations." He specifically cited occupation of foreign territory as an "example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory."[24]

More recently, the Human Rights Committee in its General Comment No. 31 (May 2004) abandoned the literal reading altogether, taking the position that

> the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals . . . who may find themselves *in the territory or subject to the jurisdiction 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

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Political Rights—Stocktaking After the First Eleven Sessions of the UN-Human Rights Committee, 1 HUM. RTS. L.J. 136, 156 (1980); MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 635 (1982).

23. In its Wall Opinion, *supra* note 4, ¶ 109, the International Court of Justice cited the Human Rights Committee's views in U.N. Human Rights Committee, López Burgos v. Uruguay, Commc'n No. 52/1979, UN Doc. CCPR/C/13/D/52/1979 (1981) [hereinafter López Burgos v. Uruguay] ; U.N. Human Rights Committee, Celiberti de Casariego v. Uruguay, Commc'n No. 56/1979, U.N. Doc. CCPR/C/13/D/56/1979 (1981) [hereinafter Celiberti de Casariego v. Uruguay]; and U.N. Human Rights Committee, Montero v. Uruguay, Commc'n No. 106/1981, U.N. Doc. CCPR/C/OP/2, at 136 (1983/1990).

24. López Burgos v. Uruguay, and Celiberti de Casariego v. Uruguay, *supra* note 23, appendix. Tomuschat further stated:

> Never, was it envisaged . . . to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad. Consequently, despite the wording of article 2(l), the events which took place outside Uruguay come within the purview of the Covenant.

Id.

> contingent of a State Party assigned to an international peace-keeping or peace enforcement operation.[25]

The ICJ's conclusion in its *Wall* advisory opinion that the ICCPR extends to the West Bank and Gaza appears to have been based upon the unusual circumstances of Israel's prolonged occupation. The Court did not cite General Comment No. 31 in its opinion. Instead, it relied on earlier concluding observations of the Committee concerning "the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude toward their future status, *as well as the exercise of effective jurisdiction by Israeli forces therein*" and the Committee's conclusion that

> *in the current circumstances*, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect[s] the enjoyment of rights enshrined in the Covenant and fall[s] within the ambit of State responsibility of Israel under the principles of public international law.[26]

Indeed, the Court's specific holding was founded on ICCPR Article 12(1), which contains an express territorial limitation: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." Thus, arguably the most logical reading of the Court's advisory opinion is that it was based only on the view that the West Bank and Gaza were part of the "territory" of Israel for purposes of the application of the Covenant.

The Committee's recent interpretation of Article 2 in General Comment No. 31, while departing from the territorial approach clearly intended by the negotiators, nonetheless finds support in the work of some distinguished commentators who argue that the phrase "within its territory and subject to its jurisdiction" should be read as a disjunctive conjunction.[27] However, Manfred Nowak, in his commentary on the ICCPR, disagrees:

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25. *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May, 26, 2004) (emphasis added).

26. Wall Opinion, *supra* note 4, ¶ 110 (emphasis added) (quoting U.N. ESCOR Hum. Rts. Comm., 63rd Sess., *Concluding Observations of the Human Rights Committee: Israel 18/08/1998*, U.N. Docs. CCPR/C/79/Add.93, ¶ 10 (1998); U.N. ESCOR Hum. Rts. Comm., 78th Sess., *Concluding Observations of the Human Rights Committee: Israel 21/08/2003*, UN Doc. CCPR/CO/78/ISR, ¶ 11 (2003)).

27. *See e.g.* Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF HUMAN RIGHTS 72, 74 (Louis Henkin ed., 1981); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78, 79 (1995).

> [The] grammatical (re)interpretation in the sense of a "disjunctive conjunction" . . . fails, however, to convince because . . . States are not responsible for all violations of the Covenant on their territory (e.g., by insurgents, by occupation forces, etc.). The correct interpretation, which is oriented on the purpose of the Covenant in light of its historical background, was convincingly presented by *Tomuschat* in individual opinions in *López Burgos v. Uruguay*, No. 52/1979, and *Celiberti v. Uruguay*, No. 56/1979.[28]

The effective control rationale employed by the Human Rights Committee in concluding that Israel was responsible for implementing Covenant rights in occupied territory is also doubtful, especially outside the context of a long-term occupation. As Professor Tomuschat observes, "Normally a state lacks consolidated institutions abroad that would be in a position to provide to an aggrieved individual all the guarantees, which in particular, Articles 9 and 14 CCPR require."[29] In all events, as he points out, the position taken by the Human Rights Committee, that Israel is responsible for implementing the Covenant in the occupied territories "to the extent that it exercise[s] 'effective control,'" is not supported by the text of the ICCPR. "[T]his broad construction of Article 2(2) may give rise to serious doubts as to the proper role of the [Committee]. Is it authorized to interpret the CCPR in an authentic fashion? The language of Article 2(2) is relatively clear."[30]

States have also expressed disagreement with the Committee's view that the Covenant applies to acts of a state's armed forces performed outside that state's territory. For example, in its recent periodic report to the Committee on Human Rights concerning the implementation of ICCPR, the United States has once again taken the position that the provisions of the treaty do not apply outside the territory of a State at any time.[31] Earlier, the Netherlands challenged a request by the Committee on Human Rights to provide information about the fall of Srebrenica.[32] The Netherlands told the Committee that:

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28. Manfred Nowak, *U.N. Covenant on Civil and Political Rights*, CCPR COMMENTARY 43 (2d rev. ed. 2005).

29. CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 110 (2003).

30. *Id.*

31. U.S. DEP'T OF STATE, UNITED STATES SECOND AND THIRD PERIODIC REPORT CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2005), *available at* http://www.state.uov/g/drl/rls/55504.htm (last visited Mar. 8, 2006). The United States also informed the Committee during the presentation of its initial report that "[t]he Covenant was not regarded as having extraterritorial application" because of the "dual requirement" of Article 2(1). *Summary Record of the 1405th Meeting: United States of America*, ¶ 20, U.N. Doc. CCPR/C/SR.1405 (Mar. 31, 1995).

32. *Concluding Observations of the Human Rights Committee: Netherlands*, ¶ 27, U.N. Doc. CCPR/CO/72/NET (Aug. 27, 2001).

> [t]he Government disagrees with the Committee's suggestion that the provisions of the International Covenant on Civil and Political Rights are applicable to the conduct of Dutch blue helmets in Srebrenica. . . . Article 2 of the Covenant clearly states that each State Party undertakes to respect and to ensure to all individuals "within its territory and subject to its jurisdiction" the rights recognized in the Covenant, including the right to life enshrined in article 6. It goes without saying that the citizens of Srebrenica, vis-à-vis the Netherlands, do not come within the scope of that provision.[33]

What is even more important, although various overseas military missions involving states parties have been undertaken since the adoption of the Covenant, most recently in Iraq, Bosnia and Herzegovina, and the former Federal Republic of Yugoslavia (FRY), not one state has indicated, by making a derogation from those rights as provided under Article 4 of the Covenant, a belief that its actions abroad constituted an exercise of jurisdiction under the Covenant. All derogations under Article 4 have been lodged with respect to internal laws only.[34]

D. Subsequent Practice Concerning ECHR

In its recent decision in *Bankovic v. Belgium*, the Grand Chamber of the European Court of Human Rights relied upon similar state practice with respect to derogations in finding that victims of the extraterritorial acts by NATO forces in bombing the headquarters of Radio Television Serbia were not "within the jurisdiction" of the member states for purposes of Article 1 of the ECHR.[35] The European Court stated that "Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case."[36] Perhaps most significant for present purposes, the Court described the territorial scope of Article 2 of the ICCPR as having been "definitively and specifically confined" by the drafters. "[I]t is difficult to suggest," the Court observed, "that exceptional recognition by the Human Rights Committee of certain instances of extra-territorial jurisdiction (and the applicants give one example only

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33. *Replies of the Government of the Netherlands to the concerns expressed by the Human Rights Committee: Netherlands*, ¶ 19, U.N. Doc. CCPR/CO/72/NET/Add.1 (Apr. 9, 2003).

34. MULTILATERAL TREATIES DEPOSITED WITH THE U.N. SECRETARY-GENERAL, ch.4.4, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/ chapterIV.asp (last visited Oct. 8, 2005).

35. Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 333.

36. *Id.* ¶ 37.

[*Lopez Burgos v. Uruguay*]) displaces in any way the territorial jurisdiction expressly conferred by" Article 2(1).[37]

By contrast, in its earlier decisions involving Cyprus and Turkey, the European Court had concluded that a state's responsibility may be engaged where, as a consequence of military action, whether lawful or unlawful, it exercises effective control outside its national territory.[38] In *Bankovic*, however, the Court pointed out that in contrast to the situation in Cyprus, the FRY had not ratified the European Convention prior to the bombing and that "the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."[39]

One of the key conclusions of the European Court in *Bankovic* was that the obligations of Article 1 of the ECHR could not be divided under the effective control rationale. The Court observed that: "The wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 . . . can be divided in accordance with the particular circumstances of the extraterritorial act in question."[40] Subsequently, the Court also confirmed in *Ilascu v. Moldova and Russia* that if the ECHR applies under the effective control rationale, a state's responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration.[41]

Recently, two courts struggled with the application of the ECHR in Iraq. Although it ultimately rejected the case on other grounds, a chamber of the European Court cast doubt on the significance of *Bankovic* in *Issa v. Turkey*, a case involving a large-scale cross-border raid by Turkish military forces into northern Iraq. The Chamber relied on the views of the Human Rights Committee in *Lopez Burgos* and *Celiberti* (which, as discussed above, had been cited with approval by the ICJ in its *Wall* opinion) as evidencing a broad jurisdictional exception—that "the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory."[42] Even more recently, in *Al Skeini & Others v. Secretary of State for Defence*, which involved alleged violations of rights under the ECHR by British occupation forces in Iraq, the England and Wales High Court concluded that the "broad

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37. *Id.* ¶ 54.

38. *See* Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995); Loizidou v. Turkey, 1996–VI Eur. Ct. H.R. 2216, 2234–35; Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1 (Grand Chamber).

39. *Bankovic*, XII Eur. Ct. H.R. 333, ¶ 80.

40. *Id.* ¶ 75.

41. Ilascu v. Moldova and Russia, 2004 Eur. Ct. H.R. 316.

42. Issa v. Turkey, 2004 Eur. Ct. H.R. 71.

dicta" of Issa were "inconsistent with *Bankovic*."[43] The High Court found, inter alia, that it did not have "broad, world-wide extra-territorial personal jurisdiction" over "the case of deaths as a result of military operations" since "it would drive a coach and horses through the narrow exceptions" recognized in *Bankovic* and because "there would be nothing to stop jurisdiction arising, or potentially arising, across the whole range of rights and freedoms protected by the Convention."[44] The Court did find that the case of an individual who had been arrested by British forces on charges of terrorism and was being held in "a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities," and not as a "prisoner of war," "falls within a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and in the case of *Hess v. United Kingdom*, a prison."[45]

E. Article 43 of the Hague Regulations

Is Article 43 of the Hague Regulations of any relevance? It specifically provides that an occupying power must 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." Where the territorial sovereign has not ratified a treaty prior to the commencement of the occupation, is the administrator of the occupied territory required to preserve the rights of the territorial sovereign, which chose not to ratify the particular treaty?[46] Should Israel be deemed responsible for implementing the provisions of the Covenants and the CROC in the West Bank and Gaza, even though those treaties were not ratified by the territorial sovereign prior to the occupation? If the treaties apply extraterritorially, should Israel for that reason remain residually responsible for implementing the full range of rights and freedoms protected in those instruments where it transferred most responsibilities for civil government in the Gaza Strip and parts of the West Bank to the Palestinian Authority? [47]

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43. Al Skeini v. Sec'y of State for Defense [2004] EWHC (Admin) 2911, ¶¶ 263, 265 (Eng.).

44. *Id.* ¶¶ 269, 284, 285. As a result the High Court dismissed appeals by relatives of five Iraqis who died in shooting incidents in the southern Basra area.

45. *Id.* ¶¶ 286–87.

46. As Oppenheim points out: "There is not an atom of sovereignty in the authority of the occupant. . . ." L. Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 L.Q. REV. 363, 364–65 (1917).

47. In its appearances before the international human rights treaty bodies, Israel has consistently maintained that as a result of the May 1994 Gaza-Jericho Agreement and the 1995 Interim Agreement on the West Bank and the Gaza Strip that it "has no say, control, or jurisdiction" over the Gaza Strip and in Areas A and B of the West Bank, where the vast majority of the Palestinian population resides, and thus that it has no ability to implement the rights enshrined in these treaties. *See, e.g.*, STATE OF ISRAEL, IMPLEMENTATION OF THE CONVENTION THE RIGHTS OF THE CHILD IN ISRAEL: RESPONSE OF ISRAEL TO THE "LIST OF ITEMS TO BE TAKEN UP IN CONNECTION WITH THE CONSIDERATION OF THE INITIAL REPORT OF ISRAEL," ¶ 43 (2002),

By way of example, the Coalition Provisional Authority did not attempt to implement the provisions of the Convention Against Torture[48] in Iraq, as Iraq had not ratified the treaty prior to the occupation. The Committee Against Torture, in contending that the U.K had an obligation to implement the provisions of the Convention in Iraq, "observe[d] that the Convention protections extend to all territories under the jurisdiction of a State party and considere[d] that this principle includes all areas under the *de facto* effective control of the State party's authorities."[49] Nonetheless, the United Kingdom continued to maintain with respect to application of the Convention Against Torture in Iraq that it "could not have taken legislative or judicial measures of the kind envisaged since legislative authority was in the hands of the CPA and judicial authority was largely in the hands of the Iraqi courts."[50]

The Human Rights Committee will no doubt face an uphill struggle in seeking to implement its views on the extraterritorial application of the ICCPR in situations of armed conflict and military occupation, even after the ICJ decision. Unlike judgments of the European Court of Human Rights,[51] the views of the Human Rights Committee under the First Optional Protocol to the ICCPR are not considered to be legally binding.[52] In any event, the Committee's position in its General Comment No. 31 and in its concluding observations concerning Israel is at odds with the plain meaning of Article 2(1), the practice of states that have ratified the Covenant, and the original intent of the negotiators.

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available at http://www.unhchr.ch/html/menu2/6/crc/doc/replies/wr-israel-1.pdf (last visited Mar. 11, 2006).

48. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

49. *Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories*, ¶ 4(b), U.N. Doc. CAT/C/CR/33/3 (Dec. 10, 2004).

50. *Al Skeini*, [2004] EWHC (Admin) 2911, ¶ 103. At the close of the negotiations on the Convention Against Torture in 1984, the United States maintained that the treaty "was never intended to apply to armed conflicts and thus supersede the 1949 Geneva Conventions on humanitarian law in armed conflicts and the 1977 Protocols additional thereto." Commission on Human Rights, *Report of the Working Group on a Draft Convention Against Torture*, UN Doc. E/CN.4/1984/72 at ¶ 5. No delegation contradicted the U.S. statement. *See also Report of the Secretary-General*, UN Doc. A/39/499, at 15 (1984) (statement of Norway) ("For these kinds of armed conflicts, the Geneva Conventions and the First Additional Protocol established a system of universal jurisdiction and of implementation that must be considered equal to the system of the convention against torture.").

51. Article 46(2) of the European Convention, *supra* note 12, gives the Committee of Ministers authority to ensure enforcement of any final judgments.

52. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302. Article 5(4) of the Protocol gives the Committee only the authority to "forward its views to the State Party concerned and to the individual." *See, e.g.*, KIRSTEN YOUNG, THE LAW AND PROCESS OF THE HUMAN RIGHTS COMMITTEE 176 (2002); Christian Tomuschat, *Evolving Procedural Rules: The UN Human Rights Committee's First Years in Dealing with Individual Communications*, 1 HUM. RTS. L.J. 249, 255 (1980). Additionally, only 105 out of the 155 states parties to the International Covenant on Civil and Political Rights (ICCPR) have ratified the First Optional Protocol.

II. IF BOTH HUMANITARIAN AND HUMAN RIGHTS LAW APPLY, DOES THE FORMER PREVAIL AS *LEX SPECIALIS*?

What explains the lack of notice of derogations by states concerning the extraterritorial application of the Covenant and the European Convention during periods of armed conflict and military occupation as discussed above? Two possible legal theories suggest themselves: that states believe that the obligations assumed under these instruments apply only within their territory and not to acts of armed forces executed outside their territory; or that the *lex specialis* of humanitarian law suspends the extraterritorial application of the instruments during periods of armed conflict and military occupation. At times, the United States has maintained both positions. For example, with respect to the detainees in Guantanamo, the United States has taken the position that "the ICCPR would not govern this case if it were otherwise privately enforceable and applicable outside U.S. territory.... [The ICCPR]... is intended to secure 'civil and political rights'—that is, the rights and obligations between a government and the governed." Noting that the Guantánamo detainees are being held under the law of war, which "applies during armed conflict to regulate interactions between governments and members of enemy forces," the U.S. position states that this separate law of war "addresses specifically and in detail obligations with respect to detainees seized in combat" and is the law that "covers the detainees."[53]

The ICJ *Wall* advisory opinion apparently recognizes that the *lex specialis* of international humanitarian law may exclude the general application of the provisions of the ICCPR during situations of armed conflict and military occupation. The Court suggests that the specific protections provided by the two categories of instruments could be split into three groups of rights: "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."[54] However, the Court did not offer specific guidance on how to subdivide the rights into these categories. Without further analysis of the *lex specialis*, the Court determined that Israel's security barrier "impede[s] the liberty of movement of the inhabitants of the Occupied Palestinian Territory . . . as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights."[55]

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53. Brief for Appellees at 45–46, Coalition of Clergy, Lawyers & Professors v. Bush, 310 F.3d 1153 (9th Cir. 2002) (No. 02-55367). Plaintiffs had argued that the ICCPR creates judicially enforceable rights that may be properly invoked in habeas corpus proceedings. The Ninth Circuit dismissed the case without reaching the issue.

54. Wall Opinion, *supra* note 4, ¶ 106.

55. *Id.* ¶ 134.

One important doorway to understanding the Court's opinion is its factual determination that "the military operations leading to the occupation of the West Bank in 1967 ended a long time ago."[56] Under Article 6 of the Fourth Geneva Convention, the provisions of the Convention ceased to apply in the territory of Israel when the military operations ended and one year later in the occupied territories. Thus, the Court's logic left it with a highly unusual situation; while under Article 6 some of the provisions of the Fourth Geneva Convention continued to apply to the extent Israel exercised the functions of government, many other protections provided under the Convention relating to civil and political rights were no longer applicable. In fact, the Court's finding rendered inapplicable two provisions of the Fourth Geneva Convention that would appear to be in conflict with the relevant provisions of the ICCPR. Articles 42 and 78 permit internment or placement in assigned residence of protected persons where the security of the detaining power makes it absolutely necessary.

In its earlier advisory opinion in *Legality of the Threat or the Use of Nuclear Weapons,* the Court also observed in abstract terms that "the protection of the International Covenant on Civil and Political Rights does not cease in wartime, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[57] The Court further cautioned, however, that the "most directly relevant applicable law . . . is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities" and that "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."[58] Hence, based on the reasoning employed by the ICJ in its *Nuclear Weapons* advisory opinion, even if the provisions of the ICCPR could be said to apply during periods of armed conflict, whether the detention of combatants seized in armed conflict or the internment of civilians is "arbitrary" under Article 9 of the ICCPR could only be decided by reference to international humanitarian law.

Moreover, as the UN independent expert on the protection of human rights in countering terrorism (Robert Goldman) recently observed, while the "[h]uman rights treaty bodies have no common approach on how human rights law relates to rules of international humanitarian law," the Inter-American Commission on Human Rights (IACHR) has "looked to rules and standards of

56. *Id.* ¶ 125.

57. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).

58. *Id.*, ¶¶ 25, 34.

international humanitarian law . . . as the *lex specialis* in interpreting and applying the American Convention or the American Declaration in combat situations."[59] For example, in the context of a case involving the Guantanamo detainees the IACHR observed that:

> In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law including the jurisprudence of the Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*.[60]

In short, it would appear that the best reading of the interrelationship between the ICCPR and international humanitarian law at least with respect to detention of combatants or the internment of civilians, is the more traditional view that international humanitarian law should be applied as the *lex specialis* in determining what a state's obligations are during armed conflict or military occupation.

Before turning to the question of derogations, I would like to consider briefly the role that the Security Council has played in resolving possible differences within the international community over what specific rules of international law govern extraterritorial detention by multinational forces. The Council has authority under Chapter VII, when necessary "to maintain or restore international peace and security," to authorize measures that may be inconsistent with otherwise applicable treaties. Under Article 103 of the UN Charter, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

For example, the extraterritorial security detention currently employed by the MNF in Iraq has been authorized by UN Security Council resolution 1546. The resolution "[d]ecides that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution." The

59. U.N. ESCOR Hum. Rts. Comm., *Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 29–30, U.N. Doc. E/CN.4/2005/103 (Feb. 7, 2005).

60. Decision on Request for Precautionary Measures, Mar. 12, 2002, 41 I.L.M. 532, 533. *See also* OFFICE OF U.N. HIGH COMMISSIONER OF HUMAN RIGHTS, THE WORKING GROUP ON ARBITRARY DETENTION, FACT SHEET NO. 26, ANNEX IV (stating that "Situations of armed conflict, covered by the Geneva Conventions of 12 August 1949 and their Additional Protocols, do not fall within the competence of the Group"), *available at* http://www.ohchr.org/english/about/publications/docs/fs26.htm#A4 (last visited Mar. 19, 2006).

letter from the U.S. Secretary of State annexed to the resolution states that the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security in Iraq, including "internment where this is necessary for imperative reasons of security."

Recently, the United Kingdom's High Court of Justice issued an important decision that addresses the authority of the MNF to detain security internees under UNSCR 1546 and the relationship of that authority to the human rights protections provided under Article 5 of the ECHR concerning arbitrary detention. In *Al Jedda v. Secretary of State for Defense*, a British citizen who had been detained for nine months by British forces in Iraq on security grounds challenged the detention as inconsistent with the United Kingdom's domestic law implementing Article 5 of the ECHR.[61] The Court concluded that by UNSCR 1546 the Security Council authorized the MNF "to continue the powers exercisable in accordance with Article 78 of Geneva IV but inconsistent with Article 5 of the ECHR" and "to intern those suspected of conduct creating a serous threat to security in Iraq."[62] The Court further found that since the resolution was made under the provisions of the Charter, in particular those authorities established under Chapter VII, "the resolution does . . . in principle override Article 5 of the Convention in relation to the claimant's detention in Basra."[63]

III. IF HUMAN RIGHTS LAW APPLIES, WHAT IS THE PERMISSIBLE SCOPE OF POSSIBLE DEROGATIONS?

As noted at the outset, the ICJ concluded in its *Wall* advisory opinion 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, and that Israel had forfeited its right to derogate from the right to liberty of movement because of its failure to give other states proper notification of such an intent. The Court repeatedly emphasized that Israel's notification of intent to derogate involved only Article 9 of the Covenant, "which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention."[64] The other Articles of the Covenant therefore remained applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

Two issues would appear to present themselves in the context of our discussion concerning extraterritorial detention: would states be able to

61. Al Jedda v. Sec'y of State for Defense, [2005] EWHC (Admin) 1809, (Eng).

62. *Id.* ¶¶ 92–93.

63. *Id.* ¶ 122.

64. Wall Opinion, *supra* note 4, ¶ 127.

derogate from rights automatically if they are involved in an armed conflict or military occupation; and could they derogate entirely from the protections provided under international human rights instruments concerning arbitrary detention.

A. Suspension of Rights Generally

Article 4(1) of the ICCPR, like Article 15 of the ECHR, provides that states "may take measures derogating from their obligations" under the Covenant "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." The article was based on the constitutions or emergency legislation of states, including the United Kingdom, empowering the head of state or government to declare a state of emergency and suspend domestic rights, such as through denial of liberty of movement, detention without trial, press censorship, and the creation of special tribunals. The Uruguayan representative, during the negotiations of Article 4, appears to have reflected the views of most delegations by emphasizing that the executive is authorized to suspend constitutional guarantees "in most national legislations."[65]

As pointed out above, states in actual practice have notified other states under ICCPR Article 4(3) of the suspension of their *domestic laws* during periods of internal disturbance. But *not one* state has submitted a notice of derogation suspending the application of the Covenant extraterritorially during periods of international armed conflict or military occupation. Indeed, it is difficult to see how generally states contributing troops to multilateral forces would be able to suspend civil and political rights during periods of armed conflict and military occupation. The individual states contributing troops to a multinational force may or may not be party to the ICCPR, or, face a public emergency that threatens the life of that nation as required by Article 4(1) of the ICCPR. Could some members of a coalition suspend ICCPR rights extraterritorially on behalf of other members?

This "state of legal uncertainty" concerning the ability of participating states in a multilateral force to derogate from international human rights instruments was one of the key factors that led the British High Court in *Al Jedda* to conclude that the provisions of UNSCR 1546 applied in lieu of Article 5 of the ECHR. The Court observed that individual states contributing troops to the MNF in Iraq might not face a "war or public emergency threatening the life of the nation" as required by Articles 15 of the ECHR and that "[p]articipating states need to know where they stand when faced with making

65. *Summary Record of the Hundred and Ninety-fifth Meeting*, U.N. ESCOR, Comm'n on Hum. Rts., 6th Sess., 195th mtg. at 11, U.N. Doc. E/CN.4/SR.195 (1950) (statement of the representative of Uruguay).

decisions at very short notice."[66] The Court also relied on the fact that no state has derogated in relation to actions abroad at the invitation of the Security Council since 1951.

The extraordinary and unprecedented proposition in the ICJ *Wall* case that the provisions of international human rights instruments apply extraterritorially unless there has been a specific derogation appears to put at risk the participation by states in United Nations and other multinational operations outside their own territory, by placing them in the position of undermining, through their own liability, the human rights situations in territories where the operations are conducted.

B. Permissible Scope of Derogations.

With respect to the permissible scope of derogations, Article 4(2) of the ICCPR stipulates that no derogation may be made from Articles 6 (right not to be arbitrarily deprived of one's life), 7 (prohibition of torture), 8 (prohibition of slavery and servitude), 11 (prohibition of detention for debt), 15 (prohibition of retroactive criminal laws), 16 (recognition as a person before the law), and 18 (freedom of thought, conscience, and religion). However, the Human Rights Committee in its General Comment No. 29 argued that the list of nonderogable provisions in Article 4 is not exclusive and it proceeded to list a number of additional rights from which no derogation could be made.[67] For example, with respect to detention, the Committee stated that "in order to protect nonderogable rights, the right [under Article 9(4)] 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."[68]

Nonetheless, states in actual practice have frequently derogated from Article 9 in its entirety with respect to their domestic legislation. As of October 12, 2005, twenty-seven states had submitted notifications under Article 4(3) of the Covenant, with seventeen states derogating from Article 9 completely. Moreover, the negotiating history of the Covenant establishes that states clearly intended that Article 9 of the ICCPR could be suspended in its entirety (if it is assumed that the provision applies to a particular conflict). During the 1950 drafting session of the Commission on Human Rights, the French proposed an amendment that would have included Article 9 within the listing of nonderogable rights under Article 4 of the ICCPR. At that time, Mrs. Roosevelt proposed a sub-amendment that would have included only Article 9(4) (right

66. *Al Jedda*, [2005] EWHC (Admin) 1809, ¶91.

67. *General Comment No. 29*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 13 (Aug. 31, 2001).

68. *Id.*, ¶ 16.

to challenge detention in court).[69] France hastily withdrew its entire proposal, noting that it "was particularly opposed to the inclusion of paragraph [4] of Article 9, from which any country in time of war would be forced to derogate."[70]

During the negotiations, states were also particularly concerned that the catalog of nonderogable rights contained in Article 4(2) not interfere with the ability of states to intern enemy aliens. For example, at the 1950 session, states rejected a proposal that would have made Article 26 of the Covenant nonderogable (guaranteeing all persons equal protection of the law, and equal and effective protection against discrimination), after several delegations pointed out that it was impossible to treat enemy aliens on the same basis as citizens during periods of armed conflict.[71] The representative of the Philippines stressed that "in time of war an early measure often taken by Governments was the segregation of enemy aliens in detention camps" and that while "[s]uch a measure constituted only temporary discrimination, . . . it was evident that while in such camps the persons in question could not avail themselves of the normal processes of law."[72]

When the General Assembly later reviewed Article 4 at its 1963 session, states examined whether it was appropriate to make Article 23(2) nonderogable as well (right of men and women to marry). The proposal was withdrawn after several states maintained that they must be entitled to prevent marriage domestically during periods of hostilities, because marriage would give enemy nationals their spouse's nationality. The representative of the Netherlands specifically reminded delegations that when the Germans had invaded his country in May 1940, the "Government had found it necessary to intern persons of German origin living in its territory, . . . due to the need to protect the national security, and to the danger which Nazi infiltration had presented to the country."[73]

Thus, there is clear evidence in the negotiating record of the ICCPR that much thought was devoted to deciding what articles would be nonderogable and that omissions from the list in Article 4(2) were not inadvertent. In short, the proposition that there are other nonderogable rights in the ICCPR in addition

69. *Summary Record of the Hundred and Ninety-Sixth Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 196th mtg. at 6, U.N. Doc. E/CN.4/SR.196 (1950) (statement of Eleanor Roosevelt).

70. *Id.*

71. *See, e.g.*, *Summary Record of the Hundred and Ninety-fifth Meeting*, U.N. ESCOR, Comm'n on Hum. Rts., 6th Sess., 195th mtg. at 23, U.N. Doc. E/CN.4/SR.195 (1950) (statement of representative of Belgium); *Summary Record of the Hundred and Ninety-sixth Meeting*, U.N. ESCOR, Comm'n on Hum. Rts., 6th Sess., 196th mtg. at 3, U.N. Doc. E/CN.4/SR.196 (1950) (statement of Eleanor Roosevelt).

72. *Summary Record of the Hundred and Ninety-fifth Meeting*, U.N. ESCOR, Comm'n on Hum. Rts., 6th Sess., 196th mtg. at 5, U.N. Doc. E/CN.4/SR.196 (1950) (statement of representative of Philippines).

73. *Summary Record of the Hundred and Ninety-fifth Meeting*, U.N. GAOR 3rd Comm., 18th Sess., 1259th mtg. ¶ 8, U.N. Doc. A/C.3/SR.1259 (1963) (statement of representative of Netherlands).

to the catalog of nonderogable rights provided in Article 4(2) is doubtful, even if it is assumed that states are obligated to derogate from the extraterritorial application of human rights instruments during periods of armed conflict and military occupation.

IV. IF ONLY HUMANITARIAN LAW APPLIES, WHAT CONSTRAINTS DOES IT IMPOSE ON DETENTIONS?

The answer to the question would vary depending upon a series of circumstances including, *inter alia*, whether:

1) The detention involves enemy combatants or civilian internees;
2) The conflict was international or of a non-international character;
3) The UN Security Council authorized the particular detention;
4) The state in question had ratified the Additional Protocols of 1977 (or if relevant provisions in those instruments are customary international law).

The adoption of the Additional Protocols of 1977 also supports the view that states did not intend that there be a general merger of human rights and international humanitarian law in situations of extraterritorial detention. Both Protocols include various derogable and nonderogable rights contained in the ICCPR. For example, Article 5 of Protocol II provides special and elaborated protections for persons whose liberty has been restricted, including by internment, while Article 75(3) of Protocol I expands on the derogable protections provided in Article 9(2) of the ICCPR concerning the need to inform detainees of the reason for their detention. On the other hand, states did not include other specific guarantees provided for in the ICCPR within either Protocol. As Dietrich Schindler concludes, "The adoption of the two 1977 Protocols additional to the Geneva Conventions is a proof that a separate set of rules for armed conflict is in fact what States want."[74]

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74. Dietrich Schindler, *The International Committee of the Red Cross and Human Rights*, 208 INT'L REV. RED CROSS 3, 14 (1979). The ICRC gave the following reason for restating various provisions of the ICCPR in Protocol II:

> The system of protection set up by international humanitarian law . . . differs from that provided by instruments on human rights. Nevertheless, the view was held that some basic provisions of the International Covenant on Civil and Political Rights—particularly those from which no derogation may be made even in time of public emergency which threatens the life of the nation—should be applicable in the context of armed conflict. . . . As every legal instrument specifies its own field of application, some of the Covenant's provisions have been restated within the framework of the draft Protocol.

ICRC, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUG. 12, 1949: COMMENTARY 134 (No. CDDH/3, 1973).

V. CONCLUSION

Doctrinal clarity is likely to advance respect for international norms in conflict situations and specifically in the case of extraterritorial detention. This does not mean, however, that more law is necessarily better, or that the two branches of law—human rights and humanitarian law—should overlap. The obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict. Nor were they intended to replace the *lex specialis* of international humanitarian law. This distinction is not a trivial one. Its importance was fully understood by the architects of the Covenants.

To ignore this distinction in favor of the application of international human rights instruments to situations of international armed conflict and military occupation is, in effect, to ignore what the international community has agreed upon. To ignore this distinction is to offer a dubious route toward increased state compliance with international norms.