

SEEKING CLARITY IN RELATION TO THE PRINCIPLE OF COMPLEMENTARITY: REFLECTIONS ON THE RECENT CONTRIBUTIONS OF SOME INTERNATIONAL BODIES

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[There has been an increasing tendency among international institutional bodies to describe the relationship between humanitarian law and human rights law as being 'complementary'. This principle is generally understood to mean that the two bodies of law are not mutually exclusive but mutually reinforcing. This rhetoric of complementarity however has tended to obscure the more complex issue regarding the practical implementation of this coexistence between humanitarian law and human rights standards during times of armed conflict. This think piece seeks to consider the extent to which the more recent endeavours of some international bodies are able to develop the notion of complementarity such that it becomes persuasive and operational. It suggests that at present there has been a failure to engage in the detailed and practically grounded analysis that is required to provide the deeper foundations upon which to build an understanding as to the workability of the complementarity principle.]

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I INTRODUCTION

The application of international human rights standards during armed conflict has become an accepted principle of international law among international bodies. Since the adoption of the resolution on *Human Rights in Armed Conflicts* at the International Conference on Human Rights in Tehran in 1968,¹ this

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¹ International Conference on Human Rights, *Human Rights in Armed Conflicts Resolution XXIII* (12 May 1968), available from <<http://www.icrc.org>> at 18 October 2007. See also the companion *Declaration on Respect for Human Rights in Armed Conflicts*, GA Res 2444 (XXIII), UN GAOR, 23rd sess, 1748th plen mtg, Supp 18, UN Doc A/RES/2444 (XXIII) (19 December 1968) 164.

principle has been affirmed by an array of diverse bodies over the past 40 years.² Initially, the substantive import of this principle caused little concern from an operational perspective, as its meaning was effectively reduced to an application of international humanitarian law as *lex specialis*.³ More recently however, there has been a tendency among institutional bodies to describe the relationship between humanitarian law and human rights law as ‘complementary’.⁴

This complementarity principle is generally understood by international bodies to mean that the two spheres of law are not mutually exclusive but mutually reinforcing. Thus as the International Court of Justice explained in its advisory opinion on the *Israeli Wall*,⁵ ‘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’.⁶ In theory, this translates into a requirement that human rights standards are not simply to be interpreted exclusively through the prism of humanitarian law. Rather, they coexist with humanitarian law principles and in certain areas have an independent sphere of operation.

² See, eg, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 (‘*Nuclear Weapons*’); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 (‘*Israeli Wall*’); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ [178] <<http://www.icj-cij.org>> at 18 October 2007 (‘*Armed Activities*’); Human Rights Council, *The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations*, UN Doc A/HRC/S-2/L.1 (11 August 2006) (‘*Grave Situation of Human Rights in Lebanon*’); Human Rights Council, *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1*, UN Doc A/HRC/3/2 (3 November 2006) [64] (‘*Report on Lebanon Pursuant to Human Rights Council Resolution S-2/1*’); Human Rights Committee, *General Comment No 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [11] (‘*General Comment No 31*’); Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, UN ESCOR, 26th sess, UN Doc E/C.12/1/Add.69 (31 August 2001) [13]; Committee on the Rights of the Child, *Report on the Thirty-First Session*, UN Doc CRC/C/121 (12 March 2003) [552] (‘*Report on the Thirty-First Session*’); Philip Alston et al, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Lebanon and Israel*, UN Doc A/HRC/2/7 (7–14 September 2006) [16] (‘*Report on Extrajudicial, Summary or Arbitrary Executions*’); Office of the High Commissioner for Human Rights, *Extrajudicial, Summary or Arbitrary Executions*, UN Doc E/CN.4/RES/2005/34 (20 April 2005) preamble.

³ See *Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 240. After declaring that the right to life under the *International Covenant on Civil and Political Rights* did not cease to operate in times of armed conflict, the Court declared that ‘[t]he test of what is an arbitrary deprivation of life ... falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities’. See also William Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ (2005) 16 *European Journal of International Law* 741, 743–4.

⁴ Human Rights Committee, *General Comment No 31*, above n 2, [11]. See also *Israeli Wall (Advisory Opinion)* [2004] ICJ Rep 136; Human Rights Council, *Report on the Situation of Human Rights in Darfur*, UN Doc A/HRC/5/6 (8 June 2007) Annex II; Human Rights Council, *Grave Situation of Human Rights in Lebanon*, above n 2, preamble; Human Rights Council, *Report on Lebanon Pursuant to Human Rights Council Resolution S-2/1*, above n 2, [64]; Leila Zerrougui et al, *Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention on the Situation of Detainees at Guantánamo Bay*, UN ESCOR, 62nd sess, Agenda Items 10 and 11, UN Doc E/CN.4/2006/120 (27 February 2006) [15].

⁵ *Israeli Wall (Advisory Opinion)* [2004] ICJ Rep 136.

⁶ *Ibid* 178.

This rhetoric of complementarity, however, has tended to obscure the more complex issue regarding the practical implementation of this coexistence between international humanitarian law and human rights standards during times of armed conflict. It is one thing to assert that human rights law applies during times of armed conflict. It is quite another to demonstrate, with an appropriate degree of precision and clarity, what this means and requires on the ground such that states and their military commanders are able to understand this doctrine and make it meaningful in practice.⁷ As Colonel Michael Kelly has rightly observed, ‘in the context of real operations, it is extremely important that there be as much clarity and simplicity as possible if we are to expect military commanders and their staff to adhere strictly to legal standards’.⁸

Given this predicament, it would seem reasonable to expect that the activities of international institutional bodies with respect to the implementation and monitoring of human rights during armed conflict may offer some assistance. The aim of this think piece, therefore, is to consider the extent to which some of the more recent endeavours of three international bodies are able to develop the notion of complementarity such that it becomes persuasive and operational. The focus here will be on the decisions of the ICJ in the *Israeli Wall* advisory opinion and *Armed Activities* decision; the concluding observations of the human rights treaty monitoring bodies with respect to Israel;⁹ and the report of the Special Procedures of the Human Rights Council with respect to their report on their mission to Lebanon and Israel.¹⁰

It is acknowledged that this brief snapshot cannot provide a comprehensive insight into the extent to which international bodies can, do or should provide clarity with respect to an issue on which precision is required. At the same time, given the complexity of armed conflicts in reality and the complexity of the relationship between humanitarian law and human rights law on paper, these recent developments provide an opportunity to examine the extent to which the work of international bodies is able to grapple with, and provide direction with respect to, the practical application of the doctrine of complementarity.

⁷ Françoise Hampson and Ibrahim Salama, *Administration of Justice, Rule of Law and Democracy (Working Paper)*, UN ESCOR, 57th sess, Agenda Item 3, UN Doc E/CN.4/Sub.2/2005/14 (21 June 2005) 23.

⁸ Michael Kelly, ‘Critical Analysis of the International Court of Justice Ruling on Israel’s Security Barrier’ (2005) 29 *Fordham International Law Journal* 181, 188.

⁹ Human Rights Committee, *Report of the Human Rights Committee Volume I*, UN GAOR, 53rd sess, Supp 40, UN Doc A/53/40 (15 September 1998) 44 (‘*Report of the Human Rights Committee 1998*’); Human Rights Committee, *Report of the Human Rights Committee Volume I*, UN GAOR, 76–78th sess, Supp 40, UN Doc A/58/40 (24 October 2003) 64 (‘*Report of the Human Rights Committee 2003*’); Committee on Economic, Social and Cultural Rights, *Report on the Eighteenth and Nineteenth Sessions*, UN ESCOR, Supp 2, UN Doc E/1999/22 (31 May 1999) [227] (‘*Report on the Eighteenth and Nineteenth Sessions*’); Committee on Economic, Social and Cultural Rights, *Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions*, UN ESCOR, Supp 2, UN Doc E/2002/22 (6 June 2002) 103 (‘*Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions*’); Committee on Economic, Social and Cultural Rights, *Report on the Thirtieth and Thirty-First Sessions*, UN ESCOR, Supp 2, UN Doc E/2004/22 (8 March 2004) [244] (‘*Report on the Thirtieth and Thirty-First Sessions*’); Committee on the Rights of the Child, *Report on the Thirty-First Session*, UN Doc CRC/C/121 (11 December 2002) 131 (‘*Report on the Thirty-First Session*’).

¹⁰ Alston et al, above n 2.

This analysis reveals that at present the most common approach to the treatment of human rights in armed conflict by international bodies and mechanisms tends to be reductionist. By this I mean that if a matter is seen to have a general nexus with a human right, any interference with that right is considered to be a violation. It is a simplistic approach that lacks the jurisprudential rigour and detail of what I have termed a substantive approach to the assessment of human rights violations. Under such an approach it is necessary to:

- Identify the existence of a nexus between the matter and (a) human right(s);
- Identify the content of that right;
- Identify the nature of the obligation imposed upon a state with respect to the realisation of the right(s) including whether the right(s) is subject to derogation, limitation, or immediate or progressive implementation; and
- Assess whether the state has fulfilled that obligation.

It is suggested that the adoption of such an approach rather than the current tendency towards reductionism, is far more likely to provide the clarity necessary to understand the obligations of states with respect to the effective implementation of human rights standards during armed conflict. Moreover, in the absence of such an approach, the workability of the complementarity principle will remain elusive and its legitimacy compromised.

II THE INTERNATIONAL COURT OF JUSTICE

It is well recognised that the ICJ adjudicates on matters that have a significant bearing on the understanding of human rights standards.¹¹ Indeed its *Nuclear Weapons* advisory opinion is repeatedly cited in support of the proposition that such standards continue to apply in times of armed conflict.¹² Two recent decisions of the Court — its *Israeli Wall* advisory opinion and decision in *Armed Activities* — not only affirm this principle¹³ but engage in a consideration of alleged violations of several human rights standards during the armed conflicts in question. As such, they provide an opportunity to consider the extent to which the jurisprudence of the Court is able to contribute to an understanding of the measures required for the effective implementation of human rights standards during times of armed conflict.

Unfortunately, however, an examination of the Court's work reveals that it tends to adopt a reductionist approach to the treatment of human rights during times of armed conflict. Indeed, in her separate opinion in *Israeli Wall*, Judge Higgins remarks that with respect to the treatment of economic, social and

¹¹ See generally Shiv Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (2007).

¹² [1996] ICJ Rep 226, 240.

¹³ *Israeli Wall (Advisory Opinion)* [2004] ICJ Rep 136, 178; *Armed Activities (Judgment)* [2005] ICJ [178], [216] <<http://www.icj-cij.org>> at 18 October 2007.

cultural rights:

The Court has been able to do no more than observe, in a single phrase, that the wall and its associated régime ‘impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the *International Covenant on Economic, Social and Cultural Rights* [and in the *United Nations Convention on the Rights of the Child*] ...’¹⁴

The majority of the ICJ provides no meaningful discussion regarding the scope of these rights or the nature of the obligations imposed upon Israel under human rights law to secure their implementation.

The Court’s treatment of civil and political rights under the *International Covenant on Civil and Political Rights* (‘*ICCPR*’)¹⁵ is only a little more convincing. With respect to the right to freedom of movement, for example, the ICJ made mention of art 12 of the *ICCPR*,¹⁶ summarised the ways in which the wall had impacted upon the Palestinian peoples’ freedom of movement,¹⁷ and concluded that:

the Court is of the opinion that the construction of the wall and its associated regime impede 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*.¹⁸

The Court acknowledged that para 3 of art 12 allowed for restrictions on liberty of movement subject to the requirement that such restrictions are provided for by law and necessary to protect, among other things, national security. But the application of this test to the facts of the case to determine the necessity and proportionality of the wall is dealt with in one sentence: ‘On the basis of the information available to it, the Court finds that these conditions are not met in the present case’.¹⁹ In the Court’s defence, it was not assisted by Israel’s failure to respond to the allegations made against it with respect to the impact of the wall. However, given the complexity and contentious nature of the issues before the Court, its refusal to embark on a rigorous and detailed application of the relevant law to the facts of the case remains problematic. It does little to enhance its reputation for dealing with human rights issues in armed conflicts²⁰ and provides no substantive guidance as to the workability of the complementarity principle.

¹⁴ *Israeli Wall (Advisory Opinion)* [2004] ICJ Rep 136, 213 (Separate Opinion of Judge Higgins) (citation omitted).

¹⁵ Opened for signature 16 December 1966, 999 UNTS 171 (entered in force 23 March 1976).

¹⁶ *Israeli Wall (Advisory Opinion)* [2004] ICJ Rep 136, 188. Article 12 of the *ICCPR* provides: ‘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’.

¹⁷ *Israeli Wall (Advisory Opinion)* [2004] ICJ Rep 136, 189.

¹⁸ *Ibid* 191–2.

¹⁹ *Ibid* 193.

²⁰ See *Israeli Wall (Advisory Opinion)* [2004] ICJ Rep 136, 240 (Separate Opinion of Judge Buergenthal); Kelly, above n 8; Barry Feinstein, ‘The Applicability of the Regime of Human Rights in Times of Armed Conflict and Particularly to Occupied Territories: The Case of Israel’s Security Barrier’ (2005) 4 *Northwestern University Journal of International Human Rights* 238; Michael Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’ (2005) 99 *American Journal of International Law* 119.

Moreover, the Court's substantive legal analysis of the human rights issues in the *Armed Activities* decision is unable to deflect the attack on its reputation with respect to such matters.²¹ The Court simply lists a series of generalised facts concerning claims that 'the Ugandan armed forces caused loss of life to the civilian population, committed acts of torture and other forms of inhumane treatment, ... destroyed villages and dwellings of civilians'²² and that there was 'convincing evidence of the training in UPDF [Uganda People's Defence Forces] training camps of child soldiers and the UPDF's failure to prevent the recruitment of child soldiers in areas under its control'.²³ It then recites all the human rights and humanitarian law instruments to which the states were parties,²⁴ as well as the specific provisions of these instruments which Uganda is found to have violated, and concludes that the UPDF 'did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories'.²⁵

There is no substantive analysis at any stage as to the content and scope of obligations with respect to any of the rights that are found to have been violated. For example, the Court's consideration of the evidence with respect to the training and recruitment of children is dissociated from the actual content of the provisions of *Additional Protocol I*²⁶ and *Additional Protocol II*²⁷ to the *Geneva Conventions*,²⁸ art 38 of the *Convention on the Rights of the Child* ('CRC')²⁹ and

²¹ John Cerone argues that 'the court simply conclude[s], without any significant analysis, that certain provisions of these instruments had been violated': 'Human Dignity in the Line of Fire: The Application of International Human Rights Law during Armed Conflict, Occupation and Peace Operations' (2006) 39 *Vanderbilt Journal of Transnational Law* 1447, 1500. See also Aeyal Gross' criticism of the Court's invocation of human rights standards in situations of occupation, suggesting that the trend towards convergence between this body of law and international humanitarian law may actually serve to undermine and legitimise violations of rights: 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 *European Journal of International Law* 1.

²² *Armed Activities (Judgment)* [2005] ICJ [206] <<http://www.icj-cij.org>> at 18 October 2007.

²³ *Ibid* [210].

²⁴ *Ibid* [217].

²⁵ *Ibid* [211].

²⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3, arts 77(2)–(3) (entered into force 7 December 1979) ('*Additional Protocol I*').

²⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609, arts 4(3)(c)–(d) (entered into force 7 December 1978) ('*Additional Protocol II*').

²⁸ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Geneva Convention II*'); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*') (collectively, '*Geneva Conventions*').

the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*,³⁰ none of which prohibit the recruitment of all children, per se. Rather than engage in a careful analysis of the nuanced nature of the child soldier debate, the Court simply concludes that these instruments have been violated because of evidence of the training and recruitment of children. The facts may well have justified the Court's findings, but its 'oracular'³¹ tendencies create a void that undermines the legitimacy of its decision and provides a vivid illustration of reductionist judicial reasoning.

III HUMAN RIGHTS TREATY MONITORING BODIES

The limitations of the ICJ with respect to its adjudication on matters concerning human rights were recognised by Judge Higgins in her separate opinion in the *Israeli Wall*, where she lamented that:

For both Covenants, one may wonder about the appropriateness of asking for advisory opinions from the Court on compliance by States parties with such obligations, which are monitored, in much greater detail, by a treaty body established for that purpose.³²

It is beyond the scope of this analysis to respond to the invitation of Judge Higgins and engage in a comprehensive examination of the work of human rights treaty monitoring bodies in the context of armed conflict. However, a brief review of the concluding observations offered by several committees with respect to Israel's treatment of Palestinians living in the occupied territories indicates that although a wide range of issues may be covered by the Committees, it is debatable as to whether this is always accompanied by the 'greater detail' to which Judge Higgins alluded.

A *Human Rights Committee*

In the consideration by the Human Rights Committee of Israel's initial³³ and second³⁴ periodic reports, the Human Rights Committee typically expresses concern that Palestinians living in the occupied territories 'do not enjoy the same rights as Jewish settlers in those territories, in particular in regard to planning and building permits and access to land and water'.³⁵ The Human Rights Committee thus urges efforts to establish basic standards that are applicable to all persons under the jurisdiction of Israel.³⁶ It also expresses concern that the use of rubber

²⁹ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

³⁰ GA Res 54/263, UN GAOR, 97th plen mtg, UN Doc A/RES/54/263 (25 May 2000) arts 1–4.

³¹ See Antonio Cassese commenting on the decision of the ICJ on Genocide in Bosnia that 'the reader expecting a closely argued decision is left instead with the impression that the Court's holdings have a tinge of oracularity (oracles indeed are not required to give reasons)': 'The *Nicaragua* and *Tadic* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* (forthcoming).

³² [2004] ICJ Rep 136, 213 (Separate Opinion of Judge Higgins).

³³ Human Rights Committee, *Report of the Human Rights Committee 1998*, above n 9, [297]–[328].

³⁴ Human Rights Committee, *Report of the Human Rights Committee 2003*, above n 9, [85].

³⁵ Human Rights Committee, *Report of the Human Rights Committee 1998*, above n 9, [309].

³⁶ *Ibid.*

bullets³⁷ and targeted killings³⁸ by the security forces in the occupied territories raises issues with respect to the right to life, and that restrictions on movement 'raise serious issues under article 12 [of the *ICCPR*]'³⁹ as does the 'punitive ... demolition of property and homes in the Occupied Territories'.⁴⁰ Whilst the Human Rights Committee raises a number of concerns, in varying levels of detail, it does not seek to offer any substantive legal analysis with respect to these issues. There are some instances, albeit infrequent, where the Committee declares certain actions to be incompatible with the provisions of the *ICCPR*.⁴¹ Its preference, however, is to adopt a more diplomatic tone and express concern rather than condemnation with respect to the actions of a state party to the Covenant.

The approach adopted by the Committee on the Rights of the Child⁴² and Committee on Economic, Social and Cultural Rights⁴³ is unsurprisingly similar to the approach of the Human Rights Committee. These Committees also acknowledge the difficulties experienced by Israel in implementing their respective treaties due to the ongoing nature of the conflict⁴⁴ but still insist upon the application of their treaties and international covenants in times of armed conflict.⁴⁵ They then list in detail their concerns with respect to the failure of Israel to secure the relevant rights of Palestinian children and adults in the occupied territories. Such concerns are invariably expressed in general terms. Thus, for example, the Committee on the Rights of the Child was 'seriously concerned about the impact ... of military action on the rights of children in the occupied Palestinian territories'⁴⁶ and provided a similarly general set of recommendations.⁴⁷ In a similar, albeit more forceful, tone, the Committee on

³⁷ *Ibid* [313].

³⁸ Human Rights Committee, *Report of the Human Rights Committee 2003*, above n 9, [85(15)].

³⁹ Human Rights Committee, *Report of the Human Rights Committee 1998*, above n 9, [318].

⁴⁰ Human Rights Committee, *Report of the Human Rights Committee 2003*, above n 9, [85(16)].

⁴¹ Thus, for example, in its concluding observations on Israel's second periodic report, the Committee held the restrictions on the right to freedom of movement to be incompatible with art 12 of the *ICCPR*: *ibid* [85(19)].

⁴² See Committee on the Rights of the Child, *Report on the Thirty-First Session*, above n 2, [551]–[615].

⁴³ See Committee on Economic, Social and Cultural Rights, *Report on the Eighteenth and Nineteenth Sessions*, above n 9, [227]–[272]; Committee on Economic, Social and Cultural Rights, *Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions*, above n 9, [692]–[707]; Committee on Economic, Social and Cultural Rights, *Report on the Thirtieth and Thirty-First Sessions*, above n 9, [244]–[290].

⁴⁴ Committee on the Rights of the Child, *Report on the Thirty-First Session*, above n 2, [554]; Committee on Economic, Social and Cultural Rights, *Report on the Eighteenth and Nineteenth Sessions*, above n 9, [233].

⁴⁵ Committee on Economic, Social and Cultural Rights, *Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions*, above n 9, [702]–[704]; Committee on Economic, Social and Cultural Rights, *Report on the Thirtieth and Thirty-First Sessions*, above n 9, [258].

⁴⁶ Committee on Economic, Social and Cultural Rights, *Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions*, above n 9, [608].

⁴⁷ *Ibid* [609].

Economic, Social and Cultural Rights expressed

its deep concern about the State party's continuing gross violations of economic, social and cultural rights in the occupied territories, especially the severe measures adopted by the State party to restrict the movement of civilians between points within and outside the occupied territories, severing their access to food, water, health care, education and work.⁴⁸

In light of the generality of such observations, it is difficult to find support for Judge Higgins' suggestion that the human rights treaty monitoring bodies are able to offer a more detailed and rigorous analysis than the ICJ as to the scope and nature of a state's human rights obligations in times of armed conflict. This should not necessarily be taken as a slight against the Committee bodies themselves, as such a criticism would be based on a conflated understanding as to the role of their concluding observations. This process was designed and has evolved in such a way that is not intended to scrutinise in a judicial sense the extent to which a state party to a relevant treaty has complied with its obligations.⁴⁹ Indeed, it is curious as to why Judge Higgins, who was a member of the Human Rights Committee for several years, would suggest that the treaty bodies would be better placed than the Court to undertake a more detailed analysis of the extent to which the wall was in violation of Israel's obligations under international human rights law.

In any event, the point to stress here is that the Committee bodies seek to identify matters of concern which they draw to the attention of states parties to the *ICCPR* and create a constructive dialogue between the state and Committee. Concluding observations therefore serve a useful purpose in drawing attention to human rights issues that arise in armed conflict that may otherwise have been overlooked. At the same time it must be conceded that, at least in their current configuration, concluding observations have a limited role to play in providing the clarity and precision necessary to develop an understanding as to the practical operation of the complementarity principle.

This should not be taken as a licence to dismiss the relevance of the Committees' work in the context of armed conflict, as they have at their disposal other mechanisms that are designed to assist states in their understanding as to the nature of their obligations under the relevant treaties; namely, individual complaints and general comments. It is not necessary to undertake a detailed examination of these mechanisms here. It is sufficient to make three observations. First, not all treaties allow for an individual to lodge a complaint

⁴⁸ Ibid [704].

⁴⁹ In the case of the Human Rights Committee, for example, art 40 of the *ICCPR* requires state parties to the Covenant to 'submit reports' on measures taken to give effect to the obligations imposed upon states under the Covenant and 'on the progress made' towards the enjoyment of the relevant rights. The Committee is required to 'study' these reports. Thus, concluding observations were never intended to imitate a judicial or some other form of dispute settlement procedure. For a discussion on the powers, functions and performance of the Human Rights Committee, see Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed, 2000) 706–14.

with the relevant treaty monitoring body, and in any event, the state party in question may not have accepted this jurisdiction if it does exist. As a consequence, this limits the potential for this mechanism to generate jurisprudence with respect to the application of human rights in times of armed conflict, especially economic, social and cultural rights given the absence of a complaint mechanism under the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') and the *CRC*. Second, notwithstanding this limitation, the Human Rights Committee has issued several views with respect to matters arising under the *ICCPR* in the context of the extraterritorial acts of states which, by implication, may be relevant to armed conflicts.⁵⁰ Admittedly, however, the number of such cases is limited, as is the scope of the issues covered.

Third, the general comments that have been issued by the various treaty bodies have rarely addressed the issue of armed conflict. Although the Human Rights Committee is an exception in this regard, its comments in this area tend to lack detail and simply assert that human rights persist in times of armed conflict. *General Comment No 29: States of Emergency* does address the issue of derogations in some detail;⁵¹ however, *General Comment No 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant*⁵² simply recites the complementarity principle. No attempt is made by the Committee to undertake a practically grounded analysis of the way in which the particular features of an armed conflict are to be accommodated by a state party in its implementation of the obligations under the *ICCPR*. The only guidance provided by the Committee is that:

While in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.⁵³

Such generalisations are unlikely to offer solace to those tasked with the responsibility for implementation of the complementarity principle in the field. Thus, given the adoption of this doctrine, there would appear to be merit in exploring the capacity for a joint general comment between the Committee bodies, which could offer guidance on how to address the challenges and obstacles associated with the application of human rights norms during armed

⁵⁰ See, eg, *Lopez Burgos v Uruguay*, Human Rights Committee, Communication No R.12/52, UN Doc Supp 40 (A/36/40) (29 July 1981) 176; *Lilian Celiberti de Casariego v Uruguay*, IACHR, Communication No 56/1979, UN Doc CCPR/C/OP/1 (29 July 1981) 92. For a discussion of the jurisprudence of the Human Rights Committee with respect to its extraterritorial application, see Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed, 2004) 83–92.

⁵¹ Human Rights Committee, *General Comment No 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001).

⁵² Human Rights Committee, *General Comment No 31*, above n 2.

⁵³ *Ibid* [11].

conflict and their relationship with international humanitarian law.⁵⁴ In the absence of such direction, the clarity and precision necessary to implement complementarity will remain missing. Moreover, from an operational perspective, the absence of clarity will encourage and legitimise an exclusive reliance upon international humanitarian law standards as the basis upon which to interpret and apply human rights standards in armed conflict.

IV SPECIAL PROCEDURES UNDER THE HUMAN RIGHTS COUNCIL

Several of the special procedures — both thematic and country — that operate under the auspices of the Human Rights Council⁵⁵ must address as part of their mandate the enjoyment of human rights in times of armed conflict.⁵⁶ I do not intend to examine each of these mandates here. Rather, I have chosen as a case study the treatment of human rights by four Special Rapporteurs in a recent joint mission to Lebanon and Israel.⁵⁷ Although the report on the mission recites and affirms the international perspective of complementarity,⁵⁸ an examination of its content reveals an inability to match or advance this rhetoric in a substantive way.

A *Special Rapporteurs on Health and Housing*

With respect to those parts of the report that concern matters primarily within the mandate of the Special Rapporteurs on Housing and Health, the assessment offered often reveals a tendency towards reductionist human rights analysis. For much of the relevant sections, the report prefers to describe the observations of the relevant rapporteurs on the state of housing and health in the aftermath of the conflict.⁵⁹ Although references are made on occasion to the relevant human rights and humanitarian law standards, such references are particularly general. For example, at one point it is stated that ‘[t]he demolition of homes in violation

⁵⁴ It could be argued that since international humanitarian law is not strictly within the mandate of the various human rights treaty bodies, such a general comment would be inappropriate and unnecessary. Such a position, however, is misplaced. With respect to the *CRC*, art 38 effectively incorporates international humanitarian law, as it applies to children, into the Convention. It thus demands that the Committee address the relationship between human rights law and humanitarian law. In the context of the *ICCPR*, the Human Rights Committee itself has advocated the complementarity principle and thus created a legitimate expectation that its work may develop an understanding as to the meaning of the principle in practice. Although there is no express reference to humanitarian law within the *ICESCR*, the Committee has argued that the Covenant applies in times of armed conflict as well as extraterritorially. Moreover, art 23 of the *ICESCR* provides that international action to achieve the rights under the Covenant includes the conclusion of conventions. These factors also raise an expectation upon the Committee to consider the role and content of international humanitarian law in its assessment of the extent to which a state has complied with its obligations under the Covenant.

⁵⁵ The mandates of the Special Procedures created under the now abolished Commission on Human Rights were all extended by the Human Rights Council for one year during which time they are subject to a review: see generally Jeroen Gutter, ‘Special Procedures and the Human Rights Council: Achievements and Challenges Ahead’ (2007) 7 *Human Rights Law Review* 93.

⁵⁶ For a discussion of the relationship between the Special Procedures and armed conflict, see Hampson and Salama, above n 7, [64]–[70].

⁵⁷ Alston et al, above n 2.

⁵⁸ *Ibid* [16].

⁵⁹ See especially *ibid* [59]–[64], [76]–[97].

of international humanitarian law and subsequent displacement amounts to forcible eviction and calls into question numerous international human rights requirements'.⁶⁰ No mention is made, however, of the specific nature of these requirements and the concomitant obligations of states in circumstances of armed conflict.

In another section of the report, it is declared that '[o]ne of the requirements of the right to the highest attainable standard of health is that health care be accessible to all'.⁶¹ This is followed by the observation that '[d]uring the conflict, the remaining inhabitants of a number of villages in South Lebanon became extremely isolated, seriously jeopardizing their access to elementary health care'.⁶² Such comments certainly draw attention to the impact of armed conflict on elements of the right to health. However, to assert this nexus is hardly sufficient to provide guidance as to the means by which human rights law can complement humanitarian law in times of armed conflict. On the contrary, they tend to do little more than state the obvious and provide no guidance as to how the right to health can be secured during times of armed conflict. Such an approach has two potential consequences. First, it lends weight to the perception, albeit misplaced,⁶³ that human rights is essentially an aspirational set of principles that are unable to accommodate the exigencies of an armed conflict. Second, it raises the prospect that states and military commanders will either dismiss the relevance of human rights entirely or revert to the exclusive use of international humanitarian law to understand the application of human rights during armed conflict.

The often descriptive approach preferred by the relevant Special Rapporteurs could arguably be considered defensible if the objective of their mission were confined to fact-finding. However, the report proclaims to focus on violations of the rights to health and housing.⁶⁴ Its failure to fulfil this promise in any substantive way, with respect to the rights to health and housing, lends credence to David Kennedy's criticism of the human rights movement on the grounds that it often generalises too much and promises more than it can deliver.⁶⁵ If the role of human rights law is essentially reduced to a summary of the facts and passing references to applicable human rights standards, those who have reservations about the practical utility of complementarity have every reason to be sceptical and cynical as to the capacity of human rights discourse to inform and regulate the actions of parties during armed conflicts.

⁶⁰ Ibid [61] (citations omitted).

⁶¹ Ibid [63].

⁶² Ibid.

⁶³ See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 26 (entered into force 27 January 1980): 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

⁶⁴ Alston et al, above n 2, [20].

⁶⁵ David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101, 111, 116.

B *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*

It is important to stress that the approach adopted by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions is more rigorous in his analysis than his counterparts. A legal framework is clearly identified⁶⁶ and used to critique and assess the actions of the various parties to the dispute.⁶⁷ He thus offers an example of substantive legal analysis. Curiously, however, this analysis is not undertaken by reference to human rights standards. As with economic, social and cultural rights, the promise is also made that the report will focus 'on violations of the right to life and related civil and political rights'.⁶⁸ This could reasonably be taken to create an expectation that the report would engage in a consideration of the relevant provisions of the *ICCPR* as they applied to the facts of the case. But an examination of the report reveals that the analysis is exclusively confined to a consideration of the relevant international humanitarian law principles with no mention of the complementary (or potentially incompatible) human rights standards.⁶⁹

In his defence, the Special Rapporteur would readily cite the opinion of the ICJ in the *Nuclear Weapons* advisory opinion that, with respect to the right to life under the *ICCPR*, international humanitarian law as the *lex specialis* must guide its understanding and interpretation.⁷⁰ Although this approach is recognised as standard practice, it does not address the concerns advanced by commentators that it represents an oversimplification to suggest that humanitarian law holds an exclusive domain with respect to the normative content of the right to life during armed conflicts. For example, Louise Doswald-Beck argues that

the human rights law relating to the right to life is suitable to supplement and interpret IHL rules relating to the use of force for non-international conflicts and occupation, as well as the law relating to civilians taking a 'direct part in hostilities'.⁷¹

Gross, after examining the treatment of the right to life by the European Court of Human Rights in the context of the armed conflict in Chechnya, concludes that 'human rights law imposes a stricter prohibition by requiring absolute necessity as a condition for violating [the right to life], whereas IHL allows broad violations of the right to life'.⁷²

To be fair, these arguments could both have been dismissed by the Special Rapporteur: the position of Doswald-Beck, on the basis that the situations in which her thesis applies did not arise because of the international nature of the armed conflict between Lebanon and Israel; and the view of Gross, on the grounds that his observations should be confined to the understanding of the

⁶⁶ Alston et al, above n 2, [14]–[31].

⁶⁷ Ibid [32]–[58], [68]–[75].

⁶⁸ Ibid [20].

⁶⁹ Ibid [22]–[58], [68]–[75].

⁷⁰ Ibid [25].

⁷¹ Louise Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?' (2006) 88 *International Review of the Red Cross* 881, 903–4.

⁷² Gross, above n 21, 32.

right to life under the *European Convention on Human Rights*.⁷³ On a more mundane note, the failure to engage with these positions may have simply been a product of the fact that, as the report concedes, 'strict space and other constraints preclude[d] an exhaustive analysis of all of the relevant issues'.⁷⁴ In any event, the reality remains that the Special Rapporteur did not address the debate concerning the extent to which the right to life under human rights law is compatible with the understanding of the right to life under international humanitarian law. Instead, he chose to revert to humanitarian law as *lex specialis* with respect to this issue.

For some commentators, this approach may provide support for the claim expressed by Colonel Kelly that 'in truth the *ICCPR* ... can add nothing to the human rights protections'⁷⁵ offered under international humanitarian law. However, there are three reasons why those ready to read the last rites with respect to the capacity to develop a practical understanding as to the application of human rights in an armed conflict would be ill-advised to do so. First, the approach implicitly adopted by the Special Rapporteur on Extrajudicial Killings to treat international humanitarian law as the *lex specialis* when assessing the existence of any violations of the right to life under the *ICCPR* was confined to this right. As such, it must not be conflated so as to universalise the claim that international humanitarian law is *lex specialis* with respect to *all* other potential violations of human rights standards that may arise in an armed conflict.⁷⁶

Second, the technique adopted by the Special Rapporteur reflects an expanded notion of complementarity whereby institutional mechanisms traditionally associated with human rights are able to invoke their procedures in a way that contributes to the implementation and observance not just of human rights standards but of international humanitarian law. Although this practice remains

⁷³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*').

⁷⁴ Alston et al, above n 2, [13].

⁷⁵ Kelly, above n 8, 204. It is important to note that this comment was made with respect to the utility of human rights norms in a situation of occupation. It is also important to note that there are innumerable examples where the *ICCPR* and other human rights treaties can be considered to advance the level of protection offered to persons in times of armed conflict. The purpose of this paper, however, is not to refute in detail the assertion of Colonel Kelly, who was a member of the Australian Defence Force and a legal adviser to the 'Coalition of the Willing' in Iraq. Rather, it is intended to indicate that such a perception, albeit misplaced and inaccurate, persists and influences the application of law by military personnel in times of armed conflict. Thus, there is a risk that if institutional bodies or advocates reduce the application of human rights to a consideration of humanitarian law as *lex specialis*, there is the potential that such an approach will be seen as lending credence to views such as those expressed by Colonel Kelly.

⁷⁶ Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Sri Lanka*, UN ESCOR, 62nd sess, Agenda Item No 11(b), UN Doc E/CN.4/2006/53/Add.5 (27 March 2006) [28]–[29].

contentious,⁷⁷ the Special Procedures of the now abolished Commission on Human Rights, which were transferred to the new Human Rights Council, have a long history of invoking standards under both international humanitarian law and human rights law in the exercise of their mandates.⁷⁸ The mandates of the relevant procedures also provide a legitimate legal foundation for this practice.⁷⁹

It is worth noting that beyond the Special Procedures of the Human Rights Council there is also the capacity for individuals to make use of the individual complaint mechanisms that exist under several treaties and regional human rights systems. Although the focus of such complaints would be alleged violations of the relevant human rights standards, an application of the doctrine of complementarity would enable recourse to humanitarian standards to assist in the interpretation of the human rights standards.⁸⁰ This is an aspect of the complementarity debate that should not be overlooked given that, as Hans-Joachim Heintze has observed, '[t]he underdeveloped implementation mechanisms of international humanitarian law, ... have to be described as fairly ineffective, [and] are among its great[est] weaknesses'.⁸¹ Caution must of course be exercised with respect to such initiatives, given the specialist nature of international humanitarian law. As a minimum, therefore, it has been recommended by the Working Group on Arbitrary Detention that the Special Rapporteurs 'should either have training in LOAC/IHL ... or should have LOAC/IHL expertise available to them'⁸² — an edict that should extend to all human rights mechanisms that are prepared to engage in a consideration of international humanitarian law principles.

Finally, those aspects of the report of the Special Rapporteurs on their mission to Lebanon and Israel and indeed the decisions of the ICJ that have been highlighted as problematic, reveal a weakness in the legal analysis of the

⁷⁷ See, eg, the letter of the US in response to a request from the Special Rapporteur on Extrajudicial, Summary or Extrajudicial Executions for information concerning the alleged killing of an individual on the Pakistani-Afghanistan border by a missile fired by an unmanned aerial drone operated by the US Central Intelligence Agency, in which the US argued that humanitarian law did not fall within the mandate of the Special Rapporteur: Letter from the Government of the United States of America to the Special Rapporteur, 4 May 2006, available from <http://www.extrajudicialexecutions.org/communications/united_states.html> at 18 October 2007.

⁷⁸ See Bertrand Ramcharan discussing mandates of the Commission on Human Rights Special Representative on the Situation of Human Rights in El Salvador and Special Envoy of the Commission on the Situation of Human Rights in Bolivia which both extended to a consideration of human rights and international humanitarian law: 'The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts' (1984) 33 *American University Law Review* 99, 103–4.

⁷⁹ See Letter from the Special Rapporteur to the Government of the United States of America, 26 August 2005, available from <http://www.extrajudicialexecutions.org/communications/united_states.html> at 18 October 2007: The Special Rapporteur provides a comprehensive discussion of the basis upon which the mandate extends to a consideration of international humanitarian law. See also John Dugard, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, UN Doc A/HRC/4/17 (29 January 2007) [5].

⁸⁰ Human Rights Council, *General Comment No 31*, above n 2, [11].

⁸¹ Hans-Joachim Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' (2004) 86 *International Review of the Red Cross* 789, 798. See also Peter Rowe, *The Impact of Human Rights on Armed Forces* (2006) 3.

⁸² Hampson and Salama, above n 7, [76].

personnel within the relevant institutional mechanisms, rather than a fundamental flaw in the position that human rights are capable of application during an armed conflict. Indeed, the jurisprudence of other bodies such as the Inter-American system for the protection of human rights⁸³ and the European Court of Human Rights,⁸⁴ which have both dealt in detail with alleged violations of human rights standards during armed conflicts, demonstrates that such weaknesses are not structural or endemic.⁸⁵

Significantly, the report of several Special Rapporteurs on the *Situation of Detainees at Guantánamo Bay*⁸⁶ also provides an illustration of the potential for a more detailed and rigorous analysis of the application of human rights in an armed conflict. The Special Rapporteurs actually came to the view that there was no ongoing international armed conflict that would justify the application of international humanitarian law to the situation of the detainees.⁸⁷ They were, however, prepared to extend the obligations of the United States under the *ICCPR* to the treatment of the detainees, despite such persons being outside US territory, on the basis that the US exercised effective control.⁸⁸ This allowed the Special Rapporteurs to offer a relatively detailed consideration of the relevant standards under the *ICCPR* to the situation of the detainees and form views as to the existence of any violations.⁸⁹

Notwithstanding the absence of armed conflict, this process demonstrates the relevance and capacity of human rights standards to inform the treatment of persons who may be detained during an armed conflict. At the same time, its redemptive qualities are limited. The finding by the Special Rapporteurs that international humanitarian law was inapplicable means that no substantive consideration was given to this body of rules vis-à-vis its relationship with the relevant human rights standards. As a consequence, the report offers no real guidance as to the workability and application of the complementarity principle. Its analysis is exclusively based on human rights standards rather than an

⁸³ For a discussion of some of the relevant case law of the Inter-American system, see Christina Cerna, 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System' in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 141, 153–68; Hampson and Salama, above n 7, [71].

⁸⁴ For a discussion of some of the relevant case law under the *European Convention on Human Rights*, see Abresch, above n 3, 741; Hampson and Salama, above n 7, [72]; Rick Lawson, 'Life after Bankovic: On the Extraterritorial Application of the *European Convention on Human Rights*' in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 83, 92–4, 96–101.

⁸⁵ It is important to note that, for the most part, the approach of the regional bodies, especially the European Court of Human Rights, is confined to a consideration of the applicable human rights provisions rather than an integrated consideration of applicable international humanitarian law standards. Such an approach is understandable given the mandates under which the regional bodies operate. From the perspective of this analysis, however, it is important to note that although the regional bodies demonstrate the capacity to understand the implementation of human rights in armed conflicts, they are generally unable to offer guidance on the process required for an integrated analysis of international humanitarian law and human rights law.

⁸⁶ Zerrougui et al, above n 4.

⁸⁷ Ibid [21], [24].

⁸⁸ Ibid [11].

⁸⁹ Ibid [27]–[82].

integrated consideration of human rights and international humanitarian law standards.

V SOME CONCLUDING THOUGHTS

The principle of complementarity has become firmly entrenched within the discourse of international bodies when describing the relationship between human rights law and international humanitarian law. No attempt has been made here to assert the veracity or otherwise of this position; the aim has been far more modest. In light of the institutional preference for complementarity, it seemed opportune to consider the extent to which the work of such bodies was able to contribute to an understanding of the practical measures required to implement this doctrine.

The conclusions drawn indicate that at present, and at least with respect to those institutions that have been the subject of this inquiry, a reductionist rather than substantive approach tends to characterise the treatment of human rights in times of armed conflict. It is suggested that if such bodies remain intent on advocating the principle of complementarity, they must begin to engage with the detailed and practically grounded analysis that is required to provide the deeper foundations upon which to build an understanding as to the workability of this doctrine. In the absence of such an approach, states and military commanders are unlikely to be dissuaded from maintaining their embrace of international humanitarian law as the lens through which to understand and accommodate human rights considerations.⁹⁰ Such an outcome is not inevitable, but clearly significant work is required if the rhetoric of complementarity is to be translated into practice. Although this enterprise remains in its infancy,⁹¹ this think piece has sought to stimulate further discussion as to the role and potential place that international bodies may come to play in providing the clarity and rigour necessary to develop this understanding.

⁹⁰ This is not to suggest that this will be an exclusive practice as states and military personnel will and do already seek to integrate human rights considerations into their activities within an armed conflict. For example, Bruce Oswald provides a discussion on the integration of international humanitarian law and human rights standards in shaping the legal framework to regulate the treatment of detainees within a peacekeeping operation: 'The Law on Military Occupation: Answering the Challenges of Detention during Contemporary Peace Operations' (2007) 8 *Melbourne Journal of International Law* 311. Rather, given the historical tendency to focus upon humanitarian law as *lex specialis* in times of armed conflict and the relatively vague understanding of how human right standards intersect with international humanitarian law in practice, the dominant approach will remain, if not an exclusive deference, then certainly an overwhelming deference to international humanitarian law and incidental or superficial consideration of human rights considerations. See also Rowe, above n 81, 114–17, reasoning that it is unlikely that many members of military forces have been trained in human rights law given the dominance of, and preference for, international humanitarian law as *lex specialis*.

⁹¹ Commentators are already engaging in this endeavour: see, eg, Doswald-Beck, above n 71; Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 *International Review of the Red Cross* 737.