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Słowa kluczowe: konflikt zbrojny, prawa człowieka w konflikcie zbrojnym, blokada morska Strefy Gazy.

Introduction

Applicability of international human rights law in situation of armed conflict has been the subject of much debate. Since the Universal Declaration of Human Rights was transcribed for times of peace this body of law was likely not assumed to apply in situations of armed conflict including occupation.[1] While this contention may belong to the past, contemporary powers, including the United States[2], the United Kingdom[3] and

[1] C. Droege, „The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict", *Israeli Law Review*, vol. 40, no. 2, 310, p. 314.

[2] A. Bellal, G. Giacca, S. Casey-Maslen, „The International law and armed non-state actors in Afghanistan", International Review of The Red Cross, vol. 93, no. 881 (March 2011), 1, p. 18, note 83, quoting Stephen Pomper, attorney-adviser of the US Department of State (although writing in his private capacity), („despite important legal and policy changes during this period [2001–2008] ...the United States maintained its legal position with respect to the non-application of its human rights obligations to extraterritorial armed conflicts."); see also Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, United States of America*, U.N. Doc. CCPR/C/USA/3, 28 November 2005, para. 3 (expressing the view of the United States of America that „the obligations assumed by a State Party to the International Covenant on Civil and Political Rights (Covenant) apply only within the territory of the State Party.").

[3] *Conclusions and Recommendations of the Committee Against Torture: United Kingdom*, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4 (b) (expressing concenrn at „the State Party's limited acceptance of the applicability of the Convention to the actions of its forces abroad, in particular its explanation 'that those parts of the Convention which

Israel[4] maintain the position that human rights law, absent a specific treaty provision to such effect, does not apply to extraterritorial armed conflicts. Some experts also argued that human rights law occupy no place in armed conflict[5], quoting, *i. a.* the judgment of the European Court of Human Rights in the case *Bankovic and Others v. Belgium*[6] and the United Nations organs decisions regarding the military occupation of Iraq.[7]

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are applicable only in respect of territory under the jurisdiction of a State party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq."); *Comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the conclusions and recommendations of the Committee against Torture,* UN Doc. CAT/C/GBR/CO/4/ADD.1, 8 June 2006 („The UK does not consider that Article 2 [of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] requires it to ensure that acts of torture are not committed by persons who are not subject to UK laws, as such an interpretation would be impossible to implement."). See also *Al-Skeini and Others (Respondents) v. Secretary of State for Defence (Appellant)*, [2007] UKHL 26, 2007 (The UK government did not challenge the finding of a lower court that the case of an individual who had been arrested by British forces on charges of terrorism and not as a „prisoner of war," falls within a narrowly limited exception [for jurisdiction under Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms] exemplified by embassies, consulates, vessels and aircraft, and a prison. Four members of the Lords of Appeal found that the UK Human Rights Act of 1998 applied to acts of the United Kingdom armed forces outside its territory only where the victim was within the jurisdiction of the UK for purposes of Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The fifth was of the view that the 1998 Act did not apply to acts committed outside the UK and expressed no opinion whether a claim might lie under the European Convention.); *R (on the application of Smith) (FC) (Respondent) v. Secretary of State for Defence (Appellant) and another*, UKSC 29, 2010, para.

[4] Israel Ministry of Foreign Affairs, *Legal Advisor of the Israel Ministry of Foreign Affairs on the Applicability of the ICCPR to the Current Situation in the West Bank and Gaza Strip, Response of Mr. Alan Baker, Legal Advisor of the Israel Ministry of Foreign Affairs, On the Applicability of the ICCPR to the Current Situation in the West Bank and Gaza Strip*, 15 May 1998, available at: http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1998/7/Legal+Advisor+of+the+Israel+Ministry+of+Foreign+Af.htm (last accessed 8 November 2011); *Public Committee Against Torture and Others v. Government of Israel and Others*, Supplement Statement by the State Attorney's Office, HCJ 769/02, pp. 23–24, para. 78; Israel Ministry of Foreign Affairs, *The Operation in Gaza 27 December 2008-18 January 2009L Factual and Legal Aspects*, July 2009, available at: , p. 10, para. 28.

[5] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (2nd ed.), Kehl am Rhein: N. P. Engel, p. 43, note 78; M. J. Dennis, „Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", *American Journal of International Law*, vol. 99, no. (2005), 119.

[6] *Bankovic and Others v. Belgium*, February 2001, para. 71 („In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.").

[7] S.C. Res. 1483, U. N. Doc. S/RES/1483, 22 May 2003 (calling 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."); S. C. Res. 1511, U. N. Doc. S/RES/1511, 16 October 2003, S.C. Res. 1546, U. N. Doc. S/RES/1546, 8 June 2004,

This conclusion came against support for continued applicability of international human rights law during armed conflict, and therefore a form of concurrent applicability of the two bodies of law, confirmed by the practice of the United Nations Security Council and General Assembly[8], international and regional judicial[9] and quasi-judicial bodies[10],

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S.C. Res. 1637, U. N. Doc. S/RES/1637, 11 November 2005, S.C. Res. 1723, U. N. Doc. S/ /RES/1723, 28 November 2006 (authorizing the occupation forces, the Multinational Force to „to take all necessary measures to contribute to the maintenance of security and stability in Iraq" with no mention made in any of these resolutions of any obligation on the part of states to comply with international human rights instruments); Commission on Human Rights Res. 2003/84, *Situation of human rights in Iraq*, U. N. Doc. E/CN.4/RES/ 2003/84, 25 April 2003 (requesting all parties to „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."). See in this context Commission on Human Rights Res. 1991/67, *Situation of human rights in Kuwait under Iraqi occupation,* U. N. Doc. E/CN.4/RES/1991/67, 6 March 1991 (condemning „the Iraqi authorities and occupying forces for their grave violations of human rights against the Kuwaiti people and nationals of other States and in particular the acts of torture, arbitrary arrests, summary executions and disappearances in violation of the Charter of the United Nations, the International Covenants on Human Rights, and other relevant legal instruments."). See M. J. Dennis, „Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", supra note 5, pp. 456–457.

[8] S. C. Res. 1019, U. N. Doc. S/RES/1019, 9 November 1995 and S. C. Res. 1034, U. N. Doc. S/RES/1034, 21 December 1995 (in regard to Former Yugoslavia); S. C. Res., U. N. Doc. S/RES/1635, 28 October 2005 and S. C. Res. 1653, U. N. Doc. S/RES/1653, 27 January 2006 (Great Lakes region); G. A. Res. 50/193, U. N. Doc. A/RES/50/193, 22 December 1995 (Former Yugoslavia); G. A. Res. 3525 (XXX), U. N. Doc. A/3525, 15 December 1975 (territories occupied by Israel); G. A. Res. 46/135, U. N. Doc. A/RES/46/ /135, 19 December 1991 (Kuwait under Iraqi occupation); G. A. Res. 52/145, U. N. Doc. A/RES/52/145, 12 December 1997 (Afghanistan).

[9] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, 1996 ICJ Reports, p. 226, para. 25 (hereinfter: the *Threat or Use of Nuclear Weapons* Advisory Opinion); *Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, para. 106 (hereinafter: the *Wall* Advisory Opinion); *Armed Activities on the Territory of the Congo*, 2005 I.C.J. Reports 168, 9 December 2005, para. 216–217 (hereinafter: *DRC v. Uganda*); *Prosecutor v. Kunarac*, Judgment of 22 February 2001, IT–96–23–T, para. 467; *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000, para. 207–209; *Isayeva v. Russia* , Judgment of 24 Feb. 2005, App. No. 57950/00, para. 180; *I ssayeva , Y usupova, and Bazayeva v. Russia*, Judgment of 24 Feb. 2005, App. Nos. 57947/00, 57948/00, and 57949/ /00, paras. 175, 178.

[10] Human Rights Committee, *Concluding Observations on Israel*, UN Doc. CCPR/C/79/ Add.93, 18 August 1998, para. 10; Human Rights Committee, *Concluding Observations on Israel*, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11; Committee on Economic, Social and Cultural Rights, *Concluding Observations on Israel*, UN Doc. E/C.12/1/Add.69, 31 August 2001, para. 11; Committee on Economic, Social and Cultural Rights, *Concluding Observations on Israel*, UN Doc. E/C.12/1/ Add.90, 23 May 2003, paras. 14–15; Committee on the Elimination of Racial Discrimination: *Concluding Observations on Israel*, U. N. Doc. CERD/C/304/Add.45, 30 March 1998, para. 4; Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, U. N. Doc. A/HRC/12/48, 25 September 2009, p. 78, para. 295.

not objected by states[11] and joined by commentators.[12] This contribution presents the latest developments in the debate, four reports[13] produced in the aftermath of the events of 31 May 2010 when a flotilla of six vessels was boarded and taken over by Israeli Defense Forces in the course of enforcement of a naval blockade imposed on the coast of the Gaza Strip.[14] Nine passengers lost their lives and many others were wounded as a result of the use of force during the take-over operation by Israeli forces.[15] There was also significant mistreatment of passengers by Israeli authorities after the take-over of the vessels that had been completed through until their deportation, including physical mistreatment, harassment and intimidation, unjustified confiscation of belongings and the denial of timely consular assistance.[16]

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[11] Except the two being persistent objectors to the application of human rights law to armed conflict in terms of customary law. See Human Rights Committee, *Summary Record of the 2380th Meeting: United States of America*, UN Doc. CCPR/C/SR.2380, 27 July 2006, p. 2; *Summary Legal Position of the Government of Israel, Annex I to the Report of the Secretary- General Prepared Pursuant to GA Res. ES-10713*, U. N. Doc. A/ES-10/248, 24 November 2003, para. 4. See also C. Droege, „The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict", supra note 1, p. 323.

[12] UN Sub-Commission on the Promotion and Protection of Human Rights, *The Relationship between Human Rights Law and International Humanitarian Law*, U. N. Doc. E/CN.4/Sub.2/2005/14, 21 June 2005; N. Lubell, „Challenges in applying human rights law to armed conflict", *International Review of the Red Cross*, Vol. 87, No. 860, 2005, pp. 737–754; C. Droege, „Elective affinities? Human rights and humanitarian law", *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 501–548; A. Orakhelashvili, „The interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence?", *European Journal of International Law*, Vol. 19, No. 1, 2008, pp. 161–182.

[13] Human Rights Council, *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, U. N. Doc. A/HRC/15/21, 27 September 2010, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.PDF, (last accessed 8 November 2011) (hereinafter: the *Human Rights Fact Finding Mission Report*) (last accessed 8 November 2011); *Report of Turkish National Commission of Inquiry, February 2011*, available at: www.mfa.gov.tr/.../Turkish%20Report%20Final (last accessed 8 November 2011), (hereinafter: *Turkish Commission Report*); *Report of the Public Commission to Examine the Maritime Incident of 31 May 2010 – The Turkel Commission. Part One*, January 2011, available at: www.turkel-committee.com/files/wordocs/8808report-eng.pdf (last accessed 8 November 2011) (hereinafter: *Israeli Commission Report*); *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, July 2011, available at: www.un.org/.../Gaza_Flotilla_Panel_Report.pdf (last accessed 8 November 2011) (hereinafter: the *Palmer Report*).

[14] *Palmer Report*, supra note 13, p. 3. The Government of Israel imposed a naval blockade on the coast of the Gaza Strip on 3 January 2009 in order to prevent weapons, terrorists and money from entering or exiting the Gaza Strip by sea. Ibidem, p. 27, para. 46.

[15] Ibidem, p. 3.

[16] Ibidem, p. 5.

All of the reports define the circumstances of declaration and the subsequent enforcement of the blockade as a situation of armed conflict.[17] They also offer a comprehensive though concese review of the considerations regarding applicability of international human rights law to situations of armed conflict.

1. The *Human Rights Fact Finding Mission Report*

The report of the Human Rights Council fact-finding mission identified three regimes applicable within the legal framework of a contemporary (naval) blockade.[18]

The law of naval warfare, constituting a part of the law of armed conflict, regulates military activities on the high seas which are „consistent with the principles of international law embodied in the Charter of the United Nations, in particular with Article 2, paragraph 4, and Article 51"].[19] The law of naval warfare is codified in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (hereinafter: the San Remo Manual).[20]

The second law regime applying to the naval blockade of the Gaza Strip is „international humanitarian law standards binding on Israel as the occupying power in the occupied Palestinian territory"[21], including the Gaza Strip after the unilateral withdrawal by Israel of the forces from the Gaza Strip in 2005.[22] In this context Israel is bound by „standards set out in the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War" and customary rules of international humanitarian law.[23]

Finally, the conduct of the Israeli authorities during the all stages of the implementation of the naval blockade is subject also to international human rights law.[24] This statement of the Human Rights Council is

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[17] The *Human Rights Fact Finding Mission Report,* the *Israeli Commission Report* and the *Palmer Report* considered the conflict „between Israel and armed groups in Hamas-controlled Gaza" should be treated as an international one. See *Human Rights Fact Finding Mission Report,* p. 15, para. 62, p. 16, para. 68; *Israeli Commission Report*, pp. 49–50, para. 44; *Palmer Report*, p. 41, para. 73. The *Turkish Commission Report* defined the conflict as an non-international one. See *Turkish Commission Report,* p. 63.

[18] *Human Rights Fact Finding Mission Report,* supra note . pp. 11–18.

[19] Ibidem, pp. 12–13, paras. 50–51, quoting Report of the Secretary General, *Study on the Naval Arms Race*, U. N. Doc. A/40/535, 26 July1985, pp. 47–48, para. 188.

[20] Ibidem, p. 12, para. 50 („While not authoritative, its codification effort has had a significant impact on the formulation of military manuals and it has been expressly relied upon by Israel.").

[21] Ibidem, p. 15, para. 62.

[22] Ibidem, p. 15, para. 63–64.

[23] Ibidem, p. 15, para. 62.

[24] Ibidem, p. 17, para. 71.

supported by four distinct arguments: (1) Israel is party to the core human rights treaties relevant to the situation under consideration[25]; (2) the flag states of the vessels taking part in the blockade subsequent breaches (*i.a.* Greece, Turkey, Comoros, Cambodia, Kiribati, Togo, the United States of America) are also parties to these treaties, thus the treaties are applicable on the relevant vessels, exclusively whilst in international waters[26]; (3) international human rights law in its entirety continues to apply in situations of armed conflict, except for derogations in accordance with treaty provisions relating to times of emergencies[27]; (4) international human rights documents are applicable extraterritorially.[28]

The *Human Rights Fact Finding Mission Report* elaborated on the two last prerequisites. Quoting two documents of the Human Rights Committee, the *Concluding Observations on Israel* of 2010[29] and the *General Comment no. 29*[30], in addition to two advisory opinions of the International Court of Justice[31], the report stated that „international human rights law and international humanitarian law are not mutually exclusive but rather

[25] Ibidem, p. 16, para. 67. The *Human Rights Fact Finding Mission Report* made mention in the context of the following international human rights documents: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the Code of Conduct for Law Enforcement Officials; the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions. See ibidem, p. 16, para. 67, note 54; p. 18, para. 74.

[26] Ibidem, p. 12, para. 49.

[27] Ibidem, pp. 16, para. 68.

[28] Ibidem, p. 17, para. 71.

[29] Ibidem, p. 16, para. 68 quoting Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, U. N. Doc. CCPR/ISR/CO/3, 3 September 2010, para. 5 („the applicability of the regime of international humanitarian law during an armed conflict, as well as in a situation of occupation, does not preclude the application of the Covenant [International Covenant on Civil and Political Rights], except by operation of article 4, whereby certain provisions may be derogated from in a time of national emergency.").

[30] Ibidem, quoting Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, U. N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 3 („While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.").

[31] Ibidem, p. 16, para. 69, quoting the *Threat or Use of Nuclear Weapons* Advisory Opinion, supra note 9, p. 226, para. 25 („In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the

should be regarded as complementary and mutually reinforcing to ensure the fullest protection to the persons concerned."[32]

The *Human Rights Fact Finding Mission Report* confirmed also a principle of a extraterritorial applicability of the international human rights documents, at least regarding the International Covenant on Civil and Political Rights.[33] Such a meaning of the Article 2 of the Covenant[34] was confirmed by the Human Rights Committee's general comment No. 31[35], its Concluding remarks[36] and the *Wall* Advisory Opinion.[37]

It is important to note that the *Turkish Commission Report* followed the reasoning and conclusions of the *Human Rights Fact Finding Mission Report* regarding applicability of international human rights law to the naval blockade of the Gaza Strip.[38]

2. The *Israeli Commission Report*

The only source of the contemporary law of naval blockade recognized by the *Israeli Commission Report* is the law of naval warfare. Indeed, the report discussed a potential applicability of two more legal regimes, of the

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Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."); *ibid.*, pp. 16–17, para. 70, quoting the *Wall* Advisory Opinion, supra note 9, para. 106 („the protection offered by the human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of any kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.").

[32] Ibidem, p. 17, para. 71.

[33] Ibidem, pp. 17–18, para. 73.

[34] Ibidem, p. 17 („Article 2 of the International Covenant obliges each State party to respect and to ensure to all individuals „within its territory and subject to its jurisdiction" the rights recognized within it.")

[35] Ibidem („A State party must respect and ensure the rights laid down in the Covenant to anyone with the power or effective control of that State party, even if not situated within the territory of the State party.").

[36] Ibidem, p. 18, para. 73, note 63 („Furthermore, the applicability of the regime of international humanitarian law does not preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities or agents outside their own territories, including in occupied territories. The Committee therefore reiterates and underscores that, contrary to the State party's position, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the occupied territories, including in the Gaza Strip, for all conduct by the State party's authorities or agents in those territories affecting the enjoyment of rights enshrined in the Covenant (arts. 2 and 40). The State party should ensure the full application of the Covenant in Israel as well as in the occupied territories, including the West Bank, East Jerusalem, the Gaza Strip and the occupied Syrian Golan Heights.").

[37] Ibidem, p. 17, para. 73.

[38] *Turkish Commission Report*, supra note 13, pp. 105–109.

law of sea and of the international human rights law, however neither of them is determined to be applicable.

The law of sea promotes the fundamental principle of freedom of the high seas, applying not only in times of peace, but also to neutral shipping in times of armed conflict.[39] Nevertheless, the law of the sea does not operate in isolation from other rules and principles of international law, in particular, the admissibility and legality of military uses of the sea to be derived from the laws of naval warfare, rules of neutrality, and principles of customary international law.[40] As the rules of international law permit a belligerent Party to restrict the operation of neutral vessels, with the result that some of the rights of neutral nations are set aside in favor of a State engaged in the armed conflict, the law of naval warfare, as *lex specialis*, prevails over the law of the sea in time of armed conflict.[41] Accordingly, rules that regulate the imposition of a naval blockade are part of the laws of naval warfare[42] and most of the have the status of customary international law.[43]

In a similar manner, promoting the law of naval warfare (international humanitarian law) as being applied exclusively to the case as *lex specialis*, the *Israeli Commission Report* decided the question of the interface between these rules and international human rights law. Noticably, it has been done without declaring human rights norms (no to mention standards) inapplicable in the time of armed conflict.

The commission discussed two situations implicating the potential application of the international human rights law to the naval blockade of the Gaza Strip. The first relates to a suggested parallel application of international humanitarian law and international human rights law „to a territory that it classified as an «occupied territory»", as „it is often considered that human rights law may be more readily applied than in other

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[39] *Israeli Commission Report*, supra note , p. 41, para. 31.

[40] Ibidem, quoting introduction to the United Nations Convention on the Law of the Sea of 1982 („matters not regulated by this Convention continue to be governed by the rules and principles of general international law.").

[41] Ibidem, citing International Law Association, Committee on Maritime Neutrality, *Final Report to the Sixty-Eighth Conference*, (London 1998); L. Oppenheim, *International Law, A Treatise,* Vol. II, *Disputes, War and Neutrality,* H. Lauterpacht (ed.), 7th ed., New York: David McKay Company, pp. 769–770.

[42] Interestingly, the *Israeli Commission Report* uses interchangeably the terms „the laws of naval warfare" and „international humanitarian law". See *Israeli Commission Report*, p. 41, para. 32; ibidem, p. 103, para. 99, p. 104, para.100.

[43] Ibidem, p. 41, para. 32. The *Israeli Commission Report* is based on the San Remo Manual, „which offers a detailed current statement of the customary international law of naval warfare, including naval blockades. (...)However, since some of the provisions in the San Remo Manual are regarded as reflecting a progressive development of the law rather than merely a restatement thereof, the analysis below is also based on other accepted texts and manuals in order to identify areas where there may not be complete international consensus on the San Remo rules. However, it should also be noted that the areas of divergence are limited." See *Israeli Commission Report*, p. 43, para. 33.

armed conflict situations."[44] The *Israeli Commission Report* rejected such a possibility, stating that „the whole panoply of human rights law" should not „be applied by an occupying state that clearly cannot act as the sovereign authority."[45]

To strengthen its position the *Israeli Commission Report* referred to the undetermined legal status of the Gaza Strip. While noting that „various organizations and bodies continue to hold the position that Israel is an occupying power in the Gaza Strip"[46], it noticed that an Palestinian non-state entity, the *Hamas*, carries out actual physical control over the territory, with Israel controling only the borders.[47] Accordingly, „it is the *Hamas*, as the ruling power in the Gaza Strip, who is responsible for protecting the human rights of the Gaza residents, which includes „protecting the right to life, health, education, adequate living conditions and clean water.""[48]

Ruling out the possibility of extra-territorial application of human rights norms in the context of belligerent occupation, the Israeli position rejected also a parallel application of international humanitarian law and international human rights law during the conduct of hostilities. It actually recognized a statement that „the two normative regimes 'share a common „core" of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted."[49] Nevertheless, it has been also stated, „comprehensive and detailed of the international humanitarian law dealing with a naval blockade, such as the prohibition of starvation or the prohibition of depriving the civilian population of objects essential for its survival and the question of the 'damage' or 'suffering' addressed in article 102(b) of the San Remo Manual (...) address the right to life a right that also lies, of course, at the heart of international human rights law."[50] Thus, since the right of the inhabitants of the Gaza Strip to life is addressed in the *lex specialis* of of international humanitarian law, „it is these rules that should primarily be applied."[51]

Accordingly, with respect to the enforcement of the Gaza Strip naval blockade, the use of force has been considered to be interpreted under the international humanitarian law framework.[52] Under international

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[44] Ibidem, p. 102, para. 98, citing the *Wall* Advisory Opinion, paras. 102–107.

[45] Ibidem, p. 229, para. 186, note 796, citing the official Israeli position; ibidem, p. 102, para. 98, citing N. K. Modirzadeh, „The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict", 86 *International Law Studies* (2010), 349, pp. 375–376.

[46] Ibidem.

[47] Ibidem, p. 103, para. 98.

[48] Ibidem.

[49] Ibidem, p. 103, para. 99, citing *Prosecutor v. Delalic*, Appeals Chamber Judgment of 20 February 2001, No. IT-96-21-A, para. 149; T. Meron, „The Humanization of Humanitarian Law", 94 *American Journal of International Law* (2000), 239, pp. 266–267.

[50] Ibidem, p. 103, para. 99.

[51] Ibidem.

[52] Ibidem, p. 230, para. 187, citing the *Threat or Use of Nuclear Weapons* Advisory Opinion, para. 25.

humanitarian law, guided by the principle of distinction, the right to life is protected by prohibitions against indiscriminate attacks, targeting individual civilians and the civilian population unless they take a direct part in hostilities, causing superfluous or unnecessary suffering to combatants and targeting those who are *hors de combat*.[53] Interestingly, the *Israeli Commission Report* applied „human rights-based law enforcement norms" in the character of the *lex specialissima* regarding „any use of force against civilians who are not taking a direct part in hostilities."[54]

The question of the law regime applicable to a legal status and the subsequent treatment of the persons detained in the course of the blockade enforcement was not addressed in the report.

Denying the direct application of non-derogable rights envisioned in the international human rights law documents, the *Israeli Commission Report* ruled out the parallel apllication of the derogable ones (an *argumentum a maiori ad minus*). Facing the allegations that Israel is in violation of international human rights law as it restricts the movement of people to and from the Gaza Strip and thereby violates the right to freedom of movement as stated in article 12 of the International Covenant on Civil and Political Rights, the commission noted the that one of the legal conditions stipulated by the laws of naval warfare regarding the imposition of a naval blockade is the condition of „effectiveness" and its impartial implementation with regard to the shipping vessels of all States.[55] Accordingly, as the concept of a naval blockade inherently includes the restriction of all movement by sea, the right of the citizens of one state to cross the borders of the state into another state with which they are at war is not unlimited[56]. Interestingly, the commission also invoked Article 12 of the International Covenant on Civil and Political Rights to support its law of armed conflict-oriented claim, „A state may, without doubt, restrict the freedom of movement of persons beyond its borders in order to protect national security and public order."[57]

2. The *Palmer Report*

The second United Nations Organization's report dedicated to the naval blockade of the Gaza Strip confirmed much of the conclusions of the Human Rights Council Report. While identifying three sources of the law of

[53] Ibidem, pp. 230–231, para. 187, citing Articles 51 para. 4, 51 para. 3, 35 and 41, respectively of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereinafter: Additional Protocol I).

[54] Ibidem, pp. 232–233, para. 189, citing *Public Committee Against Torture v. Government of Israel*, (Israel's Supreme Court) Judgment of 14 December 2006, HCJ 769/02, para. 40; the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

[55] Ibidem, p. 104, para. 100, citing the San Remo Manual, Rule 93.

[56] Ibidem.

[57] Ibidem.

contemporary blockade[58], it discussed two matters regarding application of the international human rights law to the case, (1) relationship between international humanitarian law and international human rights law; (2) an extraterritorial application of human rights law to a vessel on the high seas.

3.1. The relationship between international humanitarian law and international humna rights law

The Palmer Panel of Inquiry recognized limitation in the application of human rights provisions in armed conflict by identifying derogation clauses in two human rights treaties that allow for suspension of application of certain rights in situations of armed conflict.[59] The fact that any measures in derogation of rights under the treaties must be proportional and consistent with other obligations under international law, that is, with „the minimum guarantees of the rule of law contained in Art. 3 of the Geneva Conventions of 1949 as well as in the two Additional Protocols of 1977"[60], could be construed as implying a *lex generalis* (human rights law) / *lex specialis* (international humanitarian law) relationship between the two legal fields in a technical sense, resulting in the practical exclusion of human rights law considerations in situations of armed conflict.[61] The *Palmer Report* rejected however this logic, promoting instead a „renvoi approach" to be applied „in the area of rights protected by both sources, *i.e.* in the area of overlapping."[62] Following this approach it could be argued that the content of human rights law is informed by the specific provisions of

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[58] *Palmer Report*, supra note 13, Appendix I, pp. 76–102, applying: (1) the law of blockade (the law law of naval warfare in a situation of armed conflict on the high seas); (2) the international humanitarian law; (3) the international human rights law.

[59] Palmer Report, p. 97, para. 61, note 199, quoting Article 4 para. 1 of the International Covenant on Civil and Political Rights and citing Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

[60] Ibidem, quoting M. Nowak, *UN Covenant on Civil and Political Rights*, (2nd ed. 2005), p. 99. See also *Ibid*em, p. 98, para. 62, quoting the *Threat or Use of Nuclear Weapons* Advisory Opinion, supra note 9, para. 25 („the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.").

[61] Ibidem, p. 98, para. 62.

[62] Ibidem, p. 99, para. 63, citing R. Kolb, *Human Rights and Humanitarian Law*, p. 37.

international humanitarian law, and that *vice versa* international humanitarian law may make reference to human rights law, „It is thus not so much a matter of putting one source in the place of the other – which is the traditional meaning of the *lex specialis* rule – but rather of complementing both with each other in the context of a proper interpretation."[63] Thus, as the use of force against persons and/or vessels in the enforcement of a blockade is to be guided by the international humanitarian law (the San Remo Manual)[64], a treatment of persons detained in the course of the enforcement of a blockade requires consideration of their status under international humanitarian law, as well as the potential application of human rights law.[65]

This view is was stated to be supported by the „constant practice of the United Nations"[66], the International Court of Justice[67] and the Human Rights Committee[68], not to mention the fact that the derogation provisions do not allow derogation from fundamental principles of human rights law, such as the right to life and the prohibition of torture.[69]

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[63] Ibidem („For example, when international humanitarian law allows for the detention of individuals, human rights law may be consulted to specify the conditions and the rights and duties of the involved State and the detainees in this situation. Conversely, when interpreting the right to life under human rights law during an armed conflict, recourse must be had to the principle of international humanitarian law which sanctions the killing of combatants."). Thus, as the use of force against persons and/or vessels in the enforcement of a blockade is to be guided by the international humanitarian law (the San Remo Manual), a treatment of persons detained in the course of the enforcement of a blockade requires consideration of their status under international humanitarian law, as well as the potential application of human rights law. See ibidem, pp. 92–93, para. 47; p. 94, para. 52.

[64] Ibidem, pp. 91–94, paras. 43–51.

[65] Ibidem, p.

[66] Ibidem, p. 98, para. 61, quoting G.A. Res. 2675 (XXV), U.N. Doc. A/8178, 9 December 1970, para. 1 („[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflicts.").

[67] Ibidem, pp. 98–99, para. 62, quoting the *Wall* Advisory Opinion, supra note 9, para. 106 („[T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."); and citing *DRC v. Uganda*, supra note 9, para. 216.

[68] Ibidem, pp. 97–98, para. 61, quoting Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11 („[t]he Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. 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.").

[69] Ibidem, p. 97, para. 61.

The adoption of the „renvoi approach" implicates two further observations regarding the parallel application of international humanitarian law and international human rights law in the time of armed conflict. Firstly, the *Palmer Report* ruled that it is difficult to make generalized statements on the exact nature of the relationship between human rights law and international humanitarian law as the application of specific provisions of either legal area depends heavily on the factual context of the situation and has to be assessed accordingly.[70] In order to avoid a creation of gaps in „the protection and empire of the principles of international law minimum standards of humanitarian/human rights protection are to observed at all times.[71]

Secondly, there is significant overlap between many of the protections provided under international humanitarian law and their counterparts under human rights law.[72] In particular, both international humanitarian law and human rights law (1) prohibit any form of discrimination in providing protection[73]; (2) prohibit murder / the arbitrary deprivation of the right to life[74]; (3) prohibit any form of torture[75]; (4) prohibit humiliating and degrading treatment[76]; (5) both require that detained individuals are granted due process rights with regard to their detention.[77]

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[70] Ibidem, p. 99, para. 64.

[71] Ibidem, quoting Preamble of Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899 (the „Martens Clause") („Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.").

[72] Ibidem, p. 99, para. 65.

[73] Ibidem, p. 100, para. 65, citing Common Article 3 para. 1 of the Geneva Conventions of 1949, Article 75 para. 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereinafter: Additional Protocol I); and Article 2 para. 1 of the International Covenant on Civil and Political Rights.

[74] Ibidem, citing Article 3 para. 1 (a) of the Geneva Conventions, Article 75 para. 2 (a), (i) of the Additional Protocol I; and Article 6 para. 1 of the International Covenant on Civil and Political Rights.

[75] Ibidem, citing Common Article 3 para. 1 (a) of the Geneva Conventions, Article 75 para. 2 (a) (ii) of the Additional Protocol I; and Article 7 of the International Covenant on Civil and Political Rights, Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[76] Ibidem, citing Common Article 3 para. 1 (c) of the Geneva Conventions, Article 75 para. 2 (b) of the Additional Protocol I; and Article 7 of the International Covenant on Civil and Political Rights, Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[77] Ibidem, citing Article 75 paras. 3–4 of the Additional Protocol I; and Articles 9–10 of the International Covenant on Civil and Political Rights.

3.2. Extraterritorial application of human rights law to a vessel on the high seas.

The issue of the enforcement of a blockade further raises the question of the extraterritorial application of human rights law to a vessel on the high seas. The *Palmer Report* took notice of the reach of human rights treaties being the subject of much debate.[78] While „some States" were generally „in favour of a narrow interpretation" of the treaties' jurisdiction clauses[79], human rights bodies and courts, including the International Court of Justice, the Committee against Torture and the Human Rights Committee have interpreted them somewhat more broadly.[80]

The Palmer Panel of Inquiry referred specifically in this context to decisions of the European Court of Human Rights and of the Committee Against Torture since the two organs had addressed the question in the context of law enforcement actions on the high seas.

The Court found that the Convention for the Protection of Human Rights and Fundamental Freedoms applied to a Cambodian ship boarded by French forces on the basis that France exercised „full and exclusive" *de facto* control over the vessel from the time of its interception so that the applicants were effectively within France's jurisdiction.[81]

A similar finding was reached by the Committee Against Torture when it concluded that de facto control over the individuals on a refugee ship in international waters triggered Spain's responsibilities under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[82]

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[78] Ibidem, p. 100, para. 66.

[79] Ibidem, quoting Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, United States of America*, U.N. Doc. CCPR/C/USA/3, 28 November 2005, para. 3 (expressing the view of the United States of America that „the obligations assumed by a State Party to the International Covenant on Civil and Political Rights (Covenant) apply only within the territory of the State Party.").

[80] Ibidem, pp. 100–101, paras. 66–67, citing the *Wall* Advisory Opinion, supra note, para. 111; Committee Against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, U.N. Doc. CAT/C/GC/2, 24 January 2008, para. 7; and quoting Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 10 („The State party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war.").

[81] Ibidem, p. 101, para. 68, citing *Medvedyev et al. v. France*, Grand Chamber Judgment of 29 March 2010, App. No. 3394/03, para. 67.

[82] Ibidem, citing Committee Against Torture, Decision, Communication No. 323/2007, U.N. Doc. CAT/C/41/D/323/2007, 10 November 2008, para.

Conclusions

A cursory analysis of the reports produced in the aftermath of the events of 31 May 2010 leads to a conclusion that two issues remain in the centre of the continuing debate concerning the question of applicability of international human rights law to situation of armed conflict. The issues are, (1) the relationship between the two bodies of law in the situation of the parallel application of international human rights law and international humanitarian law during armed conflict, and (2) the extraterritorial applicability of international human rights law norms.

The relevant findings of the analyzed documents testify to a existence of the considerable legal debate on the precise nature of the relationship between these two legal regimes. In light of the continuing application of conflicting approaches of *lex specialis* and of „renvoi approach" it is difficult to make generalized statements on the exact nature of the relationship between human rights law and international humanitarian law as the application of specific provisions of either legal area depends heavily on the factual context of the situation and has to be assessed accordingly. The principal question in terms of assessing the interaction between human rights applicable both in peacetime and war and humanitarian law applicable only to armed conflicts is whether the protection accorded to individuals under the latter is lower than that under the former. The clarification of this question requires the accurate assessment of the available evidence, and not the preconceived approach that tends to conceive one of these two fields as *lex specialis* that excludes or curtails the protection under the other field.

There is also a clear tendency in international law supporting an expansive view with respect to the applicability of human rights treaties outside the territory of States parties to the relevant conventions. What is important is the State's exercise of effective control in a specific situation. This would include the situation of the capture of a foreign-flagged vessel on the high seas in the enforcement of a blockade.

Key words: armed conflict, international human rights in armed conflict, a naval blockade of the Gaza Strip.

Summary

Applicability of international human rights law in situation of armed conflict has been the subject of much debate. This article traces the latest developments in the debate. The analyzed reports were produced in the aftermath of the events of 31 May 2010 when a flotilla of six vessels was boarded and taken over by Israeli Defense Forces in the course of enforcement of a naval lockade imposed on the coast of the Gaza Strip.

A cursory analysis of the reports leads to two conclusions. With respect to the differing opinions, it is submitted here that the continued applicability of international human rights law during armed conflict is by now firmly determined. The continuing matters in contestation are the relationship between the two bodies of law in the situation of the parallel application during armed conflict and an extraterritorial applicability of international human rights law norms.