

THE ROLE OF THE HUMAN RIGHTS COMMITTEE IN INTERPRETING AND DEVELOPING HUMANITARIAN LAW

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The four Geneva Conventions and the two Additional Protocols of 1977 generally lack authoritative mechanisms for interpretation. Interpretation and application of these treaties are left principally to the judgment of the States parties to the Geneva Conventions and Protocols¹ as well as increasingly to the International Criminal Court and tribunals. The International Committee of the Red Cross (“ICRC”) encourages States parties to comply with their obligations under humanitarian law; however, it is not an adjudicative body,² and it rarely publishes its authoritative interpretations of the Geneva Conventions and Protocols. Article 90 of Protocol I Additional to the 1949 Geneva Conventions authorizes the establishment of the International Humanitarian Fact-Finding Commission.³ While 70 states have

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¹ See Kristen Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant’s Law-Making Powers*, 50 MCGILL L.J. 285, 305 (2005) (“With regard to the enforcement of the Geneva Conventions more broadly, all contracting parties are required by Article 1 to respect the Conventions, but the only external enforcement mechanism in the treaty is Article 49 of the First Convention, which requires high contracting parties to enact penal legislation so as to prosecute grave breaches of the Conventions.”); Neil A.F. Popović, Commentary, *Humanitarian Law, Protection of the Environment, and Human Rights*, 8 GEO. INT’L ENVTL. L. REV. 67, 77 (1995) (“Much of the responsibility for compliance with the Geneva Conventions and Protocols is left to the parties themselves, aided or cajoled by the International Committee of the Red Cross (ICRC).”). The ICRC has also convened scholars from around the world to gather customary international law as to the content of humanitarian law. For a collection of works written by an international assortment of scholars on customary international humanitarian law, see CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

² See, e.g., Mary Margaret Penrose, *No Badges, No Bars: A Conspicuous Oversight in the Development of an International Criminal Court*, 38 TEX. INT’L L.J. 621, 641 (2003) (noting that the ICRC lacks adjudicative powers).

³ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 90, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I] (authorizing the establishment of the International Humanitarian Fact-Finding Commission).

accepted the competence of the Commission, which has been ready for activities since Article 90 came into force in 1991, the parties to armed conflicts have yet to call upon it.⁴

At the same time, eight human rights treaty bodies, thirty thematic mechanisms of the U.N. Human Rights Council (formerly Commission), and three regional human rights commissions and courts have been requested to respond to various situations involving humanitarian law violations.⁵ Some of these decision-making institutions (such as the Committee on the Rights of the Child and the Inter-American Commission on Human Rights)⁶

⁴ See Konstantin Meljnik & Stefan Weiss, *Conference Report—30 Years Additional Protocols To The 1949 Geneva Conventions: Past, Present and Future*, 18th Conference of the Legal Advisors to the German Army and of the Representatives of the German Red Cross, 9 GERMAN L.J. 1355, 1360 (2008) [hereinafter *Conference Report on Protocol*] (“[A]s yet no single application for investigation by the Commission has been filed.”).

⁵ See, e.g., Comm’n on Human Rights, Res. 2002/36, ¶ 13(a), in *Report on Fifty-Eighth Session*, U.N. Doc. E/CN.4/2002/200 (Apr. 22, 2002) (expressing the Commission’s “grave concern over the continued occurrence of violations relating to the right to life highlighted in the report of the Special Rapporteur [on extrajudicial, summary or arbitrary executions] as deserving special attention [including] . . . violations of the right to life during armed conflict”). See also Philip Alston et al., *The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the “War on Terror,”* 19 EUR. J. INT’L L. 183, 196-97 (2008) (“Finally, the recent study on customary international humanitarian law produced under the auspices of the International Committee of the Red Cross concluded that ‘[t]here is extensive State practice to the effect that human rights law must be applied during armed conflicts.’”). The International Court of Justice also plays a role in interpreting and developing humanitarian law. See generally GENTIAN ZYBERI, *THE HUMANITARIAN FACE OF THE INTERNATIONAL COURT OF JUSTICE: ITS CONTRIBUTION TO INTERPRETING AND DEVELOPING INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW RULES AND PRINCIPLES 1* (2008) (analyzing in systematic detail the contribution and role of the ICJ in developing international human rights and humanitarian laws).

⁶ Article 64 of the American Convention provides that any member state of the OAS may consult the Inter-American Court on the interpretation of the Convention or of other treaties on the protection of human rights in the American states. Inter-Am. Ct. H.R., *Basic Documents Pertaining to Human Rights in the Inter-American System*, 174, OEA/Ser.L.V/II.82, doc.6 rev.1 (2003), available at <http://www1.umn.edu/humanrts/iachr/general.html>. But see *Las Palmeras v. Colombia*, 2001 Inter-Am. Ct. H.R. (ser.C) No. 67, at 7-10 (Feb. 4, 2000) (“[The American Convention] has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.”). The Inter-American Court of Human Rights has thus far rejected the *lex specialis* application of humanitarian law on jurisdictional grounds, but continues to refer to and consider humanitarian law provisions. The Commission continues to apply humanitarian law as *lex specialis*. See Letter from Juan E. Méndez, President, Inter-American Commission on Human Rights, to Ref. Detainees in Guantanamo Bay, Cuba (Mar. 13, 2002),

have interpreted and applied humanitarian law in their respective domains.⁷ Some treaty bodies (including the Human Rights Committee)⁸ have generally responded to requests referring to the Geneva Conventions using only their own treaty.⁹ Other mechanisms (such as the U.N. Working Group on Enforced and Involuntary Disappearances) have deferred to the International Committee of the Red Cross.¹⁰

The International Criminal Court,¹¹ the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of

<http://www1.umn.edu/humanrts/cases/guantanamo-2003.html> (quoting the letter notifying the United States of the imposition of precautionary measures).

⁷ See, e.g., Comm. on the Rights of the Child, 19th Sess., *Concluding Observations of the Comm. on the Rights of the Child: Iraq*, ¶ 15, U.N. Doc. CRC/C/15/Add.94 (Oct. 26, 1998) (recommending that “the State party raise the legal minimum age of voluntary enlistment into the armed forces in the light of international human rights and humanitarian law”); Comm. on the Rights of the Child, 34th Sess., *Concluding Observations of the Comm. on the Rights of the Child: Israel*, ¶ 51, U.N. Doc. CRC/C/15/Add.195 (Oct. 9, 2002) (“[W]ith reference to international humanitarian law, notably the Geneva Convention relative to the Protection of Civilian Persons in Time of War, that the State party fully comply with the rules of distinction (between civilians and combatants) and proportionality (of attacks that cause excessive harm to civilians).”).

⁸ See generally *Atkinson v. Canada*, Decision on Admissibility, Human Rights Comm., 55th Sess., No. 573/1994, U.N. Doc. CCPR/C/55/D/573/1994 (1995) (citing Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention], Geneva Protocol I, and “the legal commentaries prepared by the International Committee of the Red Cross”); *Julian v. New Zealand*, Decision on Admissibility, Human Rights Comm., 59th Sess., No. 601/1994, U.N. Doc. CCPR/C/59/D/601/1994 (1997) (citing Third Geneva Convention, Geneva Protocol I and “the legal commentaries prepared by the International Committee of the Red Cross”); *T.W.M.B v. The Netherlands*, Decision on Admissibility, Human Rights Comm., 43rd Sess., No. 403/1990, U.N. Doc. CCPR/C/43/D/403/1990 (1991) (citing, *inter alia*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]).

⁹ All three of the communications cited in the preceding footnote were ruled inadmissible.

¹⁰ See Office of the High Comm’r of Human Rights, Fact Sheet No.6 (Rev.3), *Enforced or Involuntary Disappearances*, <http://www2.ohchr.org/english/issues/disappear/members.htm#facts> (“The Working Group does not deal with situations of international armed conflict, in view of the competence of the International Committee of the Red Cross (ICRC) in such situations, as determined by the Geneva Conventions of 12 August 1949 and their Additional Protocols of 1977.”).

¹¹ See generally Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (establishing the International Criminal Court).

International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTY"),¹² the International Criminal Tribunal for Rwanda ("ICTR"),¹³ and several other international or mixed national/international tribunals have a role in establishing and interpreting international humanitarian law. Further, national courts have been asked to apply humanitarian law for some time, particularly in the context of the post-2001 "war on terror."¹⁴ National military courts have consistently applied humanitarian law. Some courts (e.g., in the United States) have refused to apply humanitarian law,¹⁵ while others' invocation of it has demonstrated their reluctance to explore the contours of this relatively complex domain of international law.¹⁶

For some legal issues, human rights mechanisms and national courts can use humanitarian law to interpret international human rights or national law. For example, humanitarian law may be useful in assessing several issues such as whether a prisoner qualifies as a prisoner of war with the associated privileges,¹⁷ what

¹² See generally Statute of the International Tribunal, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter International Tribunal Statute] (establishing an international tribunal for the prosecution of persons responsible for violations of international human rights law in former Yugoslavia).

¹³ See generally Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing a tribunal "to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda").

¹⁴ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006) (finding that Common Article 3 of the Geneva Conventions applicable).

¹⁵ See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450, 468-69 (4th Cir. 2003) (declining to apply the Geneva Conventions on the grounds that they are not self-executing) *rev'd on other grounds*, 542 U.S. 507 (2004); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 605 n.25 (2008) ("The lower courts are divided on whether the Geneva Conventions are self-executing."). Compare *United States v. Khadr*, CMC R 07-001 at 4 n.4 (Ct. Mil. Comm'n Rev. 2007) (finding the Geneva Conventions "generally viewed as self-executing treaties"), and *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (observing that the "Geneva Convention is [a] self-executing treaty to which the United States is a signatory"), with *Hamdi*, 316 F.3d at 468 (observing that the Geneva Convention is not self-executing).

¹⁶ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (invoking the Third Geneva Convention but declining to engage petitioner's specific argument that his detention violated Article 5). But see *Hamdi*, 542 U.S. at 549-51 (Souter, J., concurring) (discussing petitioner's Article 5 argument). See also *Hamdan*, 548 U.S. at 567, 628-33 (offering only an abbreviated analysis to support its holding that Common Article 3 is applicable to the war against al-Qaeda).

¹⁷ See *United States v. Noriega*, 808 F. Supp. 791, 795 (S.D. Fla. 1992) (finding that Noriega is a prisoner of war).

procedural protections are applicable to an “enemy combatant,”¹⁸ and whether a killing¹⁹ or a detention is arbitrary²⁰ because it violates humanitarian law.

This article reviews more thoroughly the jurisprudence of the Human Rights Committee (“HRC”) as a prelude for a broader review of other treaty bodies, thematic mechanisms, regional human rights courts or commissions, international criminal courts or tribunals, and national courts. What lessons can be drawn about the competence of these institutions in developing humanitarian law? To what extent are there divergences or commonalities in the interpretations given by these various institutions? What conclusions can be drawn about the usefulness of humanitarian law in resolving various issues? How are human rights bodies and courts shaping the contours of humanitarian law? How has the “war on terror” and, perhaps, counter-terrorism changed the need for competent adjudicative mechanisms in the field of humanitarian law? Should there be an authoritative and widely accepted treaty body to interpret the Geneva Conventions and Protocols?

The remainder of this article addresses the HRC’s interpretation of international humanitarian law. It examines the Committee’s general approach to interpreting the International Covenant on Civil and Political Rights (“Civil and Political Covenant”), to addressing relevant issues of international law, and to specifically addressing the rules of international humanitarian law. Parts I through III consider all relevant documents that the HRC has produced including its Decisions and Views, its General Comments, and its Concluding Observations. Part IV synthesizes the methodology and approach taken by the Committee in its three realms. Part V recommends that in order for the Committee to produce precedential material interpreting international humanitarian law, it must explicitly consider the Geneva Conventions and their Optional Protocols when individual submissions raise issues of international humanitarian law. Under

¹⁸ See *Hamdan*, 548 U.S. at 613 (holding that military tribunals must comply with Uniform Code of Military Justice and Geneva Conventions Common Article 3).

¹⁹ See *Disabled Peoples’ Int’l v. United States*, Case 9213 (United States), Inter-Am. C.H.R., OAS Doc. OEA/Ser.L./V/II.67, doc. 6 (1986).

²⁰ Inter-Am. C.H.R., Decision, *Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba)* (2002) reprinted in 41 I.L.M. 532 (2002) (evaluating the legality to U.S. detentions in Guantánamo Bay, Cuba).

the Optional Protocol to the Civil and Political Covenant, the ultimate findings must be limited to violations of the Covenant itself, but the Committee could provide useful and precedential analysis of international humanitarian obligations in reaching a finding of a Covenant violation.

1. DECISIONS AND VIEWS

Under the Optional Protocol to the International Covenant on Civil and Political Rights,²¹ the HRC considers individual submissions alleging violations of rights protected by the Civil and Political Covenant.²² Because the Decisions and Views are fact-specific and contain the most analysis of the Covenant, they provide, in theory, the best possibility of establishing international humanitarian law precedent. This Part considers how the Committee has addressed issues of international humanitarian law, by first considering the Committee's general approach to relevant international instruments and then examining international humanitarian issues raised before the Committee. This Part finds that the Committee has proven extremely reluctant to address any international instrument besides the Civil and Political Covenant.

1.1. General Approach to Other International Instruments

This section first considers the development of the HRC's jurisprudence as it addressed individual complaints. Early complaints and the resulting decisions established certain parameters for the Decisions and Views: the Committee was extremely reluctant to step beyond the Civil and Political Covenant. This section then considers more recent decisions in which the Committee has begun to consider other relevant international instruments explicitly in its Decisions and Views.

²¹ See Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302, [hereinafter *Optional Protocol*] (providing an individual complaint mechanism for the International Covenant on Civil and Political Rights).

²² See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter *Civil and Political Covenant*] (providing protection to individual civil and political rights such as freedom of speech, freedom of religion, and the right to live).

1.1.1. *Jurisprudential Development*

The Optional Protocol creates a complaint mechanism for “individuals claiming to be victims of violations of any rights set forth in the [Civil and Political] Covenant.”²³ The HRC takes this mandate literally and limits its opinions to addressing provisions of the Civil and Political Covenant. Originally, the Committee took the position that to determine the rights protected by the Covenant, it would look to the “ordinary meaning of each element,” the *travaux préparatoires* of the Covenant,²⁴ and the Universal Declaration of Human Rights.²⁵

K. L. v. Denmark was the first communication to raise claims of violations of international instruments beyond the Civil and Political Covenant.²⁶ Alongside alleged violations of the Civil and Political Covenant, the author alleged violations of “a number of international instruments.”²⁷ The HRC stated:

In accordance with article 1 of the Optional Protocol, the Human Rights Committee has only examined the author’s claims insofar as they are alleged to reveal breaches by the

²³ Optional Protocol, *supra* note 21.

²⁴ See Marc J. Bossuyt, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 89 (Martinus Nijhoff Publishers 1987) (“[I]t was proposed, unsuccessfully, that in order to [sic] any possible misinterpretation of the words ‘international law,’ there should be in addition to these words a reference to the ‘principles of the Charter and the Universal Declaration of Human Rights.’”). A proposed amendment to Article 46 providing that the Covenant shall not “be interpreted in such a way as to impair the provisions of the Convention on the Prevention and Punishment of Genocide” was withdrawn in light of the political consequences of its potential rejection. *Id.* at 731-32. While it does not appear that the Commission considered the inclusion of explicit references to the Geneva Conventions or “humanitarian law,” it did consider referencing “lawful acts of war” as a source of permissible derogations. *Id.* at 92. Such references, however, were either rejected or not voted on. *Id.* This reticence to include a reference to war is attributable to the sentiment among drafters that “the covenant should not envisage, even by implication, the possibility of war, as the United Nations was established with the object of preventing war.” *Id.* at 86.

²⁵ See *J.B. v. Canada*, Decision, Human Rights Comm., 28th Sess., No. 118/1982, ¶ 6.3, U.N. Doc. Supp. No. 40 (A/41/40) (1986) (interpreting the scope of Article 22 by looking to the ordinary meaning in its context, the *travaux préparatoires* of the Covenant on Civil and Political Rights and the Universal Declaration of Human Rights).

²⁶ *K.L. v. Denmark*, Decision on Admissibility, Human Rights Comm., 9th Sess., No. 59/1979, U.N. Doc. CCPR/C/OP/1 at 24-25 (1980).

²⁷ *Id.*

State party of the provisions of the International Covenant on Civil and Political Rights. *The Committee has no competence to examine alleged violations of other international instruments.*²⁸

As the author put forth rather implausible claims related to taxation and mental illness, the HRC found the communication inadmissible on the theory that the author did not substantiate his allegations.²⁹ In another early ruling, when an author cited International Labour Organization (ILO) jurisprudence in support of establishing a right to strike under the Civil and Political Covenant, the HRC limited the ILO's interpretation by stating, "[E]ach international treaty, including the International Covenant on Civil and Political Rights, has a life of its own and must be interpreted in a fair and just manner, if so provided, by the body entrusted with the monitoring of its provisions."³⁰ The Committee then conducted an original analysis, concluding that the Covenant does not protect a right to strike.³¹ Following these cases, the HRC has not considered claims of violations of other international instruments even though communications decided through the mid-1990s frequently alleged such violations.³² The only apparent

²⁸ *Id.* at 25 (emphasis added).

²⁹ *Id.*

³⁰ *J.B. v. Canada*, Decision, Human Rights Comm., 28th Sess., No. 118/1982, ¶ 6.3, U.N. Doc. Supp. No. 40 (A/41/40) (1986).

³¹ *Id.* ¶¶ 6.3-6.4.

³² See *K.J.L v. Finland*, Decision on Admissibility, Human Rights Comm., 49th Sess., No. 544/1993, U.N. Doc. CCPR/C/49/D/544/1993 (1993) (responding only to the claim under the Civil and Political Covenant and not considering a claimed violation of the International Covenant on Economic, Social and Cultural Rights); *J.P.K. v. The Netherlands*, Decision on Admissibility, Human Rights Comm., 43d Sess., No. 401/1990, U.N. Doc. CCPR/C/43/D/401/1990 (1991) (ignoring a long list of alleged violations of various international instruments and finding no violation of the Civil and Political Covenant); *T.W.M.B. v. The Netherlands*, Decision on Admissibility, Human Rights Comm., 49th Sess., No. 403/1990, U.N. Doc. CCPR/C/43/D/403/1990 (1991) (finding again that there was no violation of the Civil and Political Covenant); *C.B.D. v. The Netherlands*, Decision, Human Rights Comm., 45th Sess., No. 394/1990, U.N. Doc. CCPR/C/45/D/394/1990 (1992) (finding no violation of the Civil and Political Covenant as well); *Blom v. Sweden*, Decision on Admissibility, Human Rights Comm., No. 191/1985, ¶ 6.3, U.N. Doc. Supp. No. 40 (A/43/40) (1988) (responding to claims that the UNESCO Convention against Discrimination in Education of 1960 and the International Covenant on Economic, Social and Cultural Rights were violated by stating the HRC "could only consider a communication in so far as it concerned an alleged breach of the provisions of the International Covenant on Civil and Political Rights").

exception occurred in *A.M. v. Denmark*, where the author claimed to be a victim of breaches of the Universal Declaration of Human Rights.³³ The Committee correlated the protected rights in the Universal Declaration to the corresponding rights in the Civil and Political Covenant and proceeded as though the author had alleged violations of the Covenant.³⁴ This exception, however, is likely because the Covenant is premised explicitly on the Universal Declaration.³⁵

The Committee similarly disregards claims of violations of customary international law.³⁶ In a singular departure, however, the HRC addressed customary international law in *A. v. Australia*.³⁷ The author, a citizen of Cambodia, claimed he was detained by Australia in violation of Article 9 of the Civil and Political Covenant and in contravention of “international treaty law and customary international law,” citing³⁸ the Convention Relating to the Status of Refugees.³⁹ Australia responded that the Committee lacked competence to adjudicate claims premised on customary

³³ See *A.M. v. Denmark*, Decision, Human Rights Comm., No. R.26/121, ¶ 3.2, U.N. Doc. Supp. No. 40 (A/37/40) (1982) (“In particular he claims to be a victim of breaches by Denmark of articles 5, 7 and 10 of the Universal Declaration of Human Rights as regards the right not to be subjected to degrading treatment or punishment, the right to equality before the law and the right to a fair trial.”).

³⁴ *Id.*

³⁵ See *J.B. v. Canada*, Decision, Human Rights Comm., 28th Sess., No. 118/1982, ¶ 6.3, U.N. Doc. Supp. No. 40 (A/41/40) (1986) (exemplifying how the Covenant is premised on the Universal Declaration).

³⁶ See *Williams v. Jamaica*, Views, Human Rights Comm., 61st Sess., No. 609/1995, ¶ 3.4, U.N. Doc. CCPR/C/61/D/609/1995 (1997) (disregarding an alleged breach of customary international law); *Julian v. New Zealand*, Decision, Human Rights Comm., 59th Sess., No. 601/1994, ¶ 3.2, U.N. Doc. CCPR/C/59/D/601/1994 (1997) (disregarding an alleged violation of international law); *Bordes v. France*, Decision on Admissibility, Human Rights Comm., 57th Sess., No. 645/1995, ¶ 2.1, U.N. Doc. CCPR/C/57/D/645/1995 (1996) (disregarding the complaint that President Chirac’s plans to conduct a series of underground nuclear tests was a “clear violation of international law”); *Nahlik v. Austria*, Decision on Admissibility, Human Rights Comm., 57th Sess., No. 608/1995, ¶ 3.1, U.N. Doc. CCPR/C/57/D/608/1995 (1996) (disregarding an alleged violation of “the general principle of equal treatment under labor law”).

³⁷ See *generally A v. Australia*, Views, Human Rights Comm., 59th Sess., No. 560/1993, ¶ 9.3, U.N. Doc. CCPR/C/59/D/560/1993 (1997) (noting that it cannot find “any support for the contention that there is a rule of customary international law” in the context laid out in the complaint).

³⁸ *Id.* ¶ 3.1.

³⁹ See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter *Refugees Convention*].

international law or other international instruments.⁴⁰ The author maintained that other international instruments were relevant to the interpretation of the Civil and Political Covenant.⁴¹ Australia responded that customary international law and other instruments could not be imported into the Covenant.⁴² The Committee ruled that it was not per se arbitrary to detain individuals requesting asylum, and that it could not “find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.”⁴³ While the Committee provided no analysis, this statement stands as the HRC’s only pronouncement on the applicability of customary international law to individual complaints under the Optional Protocol. Notably, the HRC bypassed the parties’ contentions on whether it was competent to consider customary international law and instead stated that no such law covered the author’s claim. The implication, therefore, is that the Committee must have considered customary international law in order to reach its decision.

On several occasions, the HRC has addressed potential overlap between rights protected by the Civil and Political Covenant and by other international instruments. According to the Committee, the provisions of the Covenant apply “even if a particular subject-matter is referred to or covered in other international instruments. . . .”⁴⁴ In practice, even if there is overlap between international instruments, the Committee considers the allegations under its

⁴⁰ See *A v. Australia*, Views, Human Rights Comm., 59th Sess., No. 560/1993, ¶ 4.3, U.N. Doc. CCPR/C/59/D0560/1993 (1997) (“The State party argues that the Committee is competent only to determine whether there have been breaches of any of the rights set forth in the Covenant; it is not permissible to rely on customary international law or other international instruments as the basis of a claim.”).

⁴¹ *Id.* ¶ 5.3.

⁴² *Id.* ¶ 7.7.

⁴³ *Id.* ¶ 9.3.

⁴⁴ See *Brooks v. The Netherlands*, Views, Human Rights Comm., 42d Sess., No. 172/1984, ¶ 12.1, U.N. Doc. Supp. No. 40 (A/42/40) (1987) (“The Committee is of the view that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments. . . .”). See also *Vos v. The Netherlands*, Views, Human Rights Comm., 44th Sess., ¶ 11.2, No. 218/1986, U.N. Doc. Supp. No. 40 (A/44/40) (1989) (detailing further how the provisions of the Covenant apply); *Danning v. The Netherlands*, Views, Human Rights Comm., 42d Sess., No. 180/1984, ¶ 6.3, U.N. Doc. Supp. No. 40 (A/42/40) (1987) (explaining how the provisions of the Civil and Political Covenant apply even if there are other applicable international instruments).

own jurisprudence.⁴⁵ Indeed, the Committee resolves differences between its jurisprudence and other bodies' jurisprudence in favor of its own case law.⁴⁶ As a result, the author must invoke a substantive right of the Covenant for the HRC to consider the communication.⁴⁷

The issue of overlap also arises when an author has previously submitted a complaint to the European Commission of Human Rights. The Optional Protocol to the Civil and Political Covenant precludes the HRC from considering a complaint if "the same matter" is being examined "under another procedure of international investigation or settlement. . . ."⁴⁸ In the event of submission to both bodies, the HRC determines whether the right protected by the Civil and Political Covenant is sufficiently similar to a right protected by the European Convention so as to constitute "the same matter." The HRC has found Articles 14 and 17 of the Civil and Political Covenant to be sufficiently proximate to Articles 6, 8, and 14 of the European Convention,⁴⁹ and Article 22(1) of the

⁴⁵ See, e.g., *Danning*, No. 180/1984, ¶ 6.3 (stating that even if the protected right overlaps with another instrument, the Committee must determine whether the facts indicate a breach under the Civil and Political Covenant).

⁴⁶ See *Smart v. Trinidad and Tobago*, Views, Human Rights Comm., 63d Sess., No. 672/1995, ¶¶ 3.1, 6.2, U.N. Doc. CCPR/C/63/D/672/1995 (1998) (citing its own case law favorably against a claim citing Jamaican law and the European Court of Human Rights).

⁴⁷ See *Hoofdman v. The Netherlands*, Views, Human Rights Comm., 64th Sess., No. 602/1994, ¶ 6.2, U.N. Doc. CCPR/C/64/D/602/1994 (1998) ("The Committee recalled that, whereas authors must invoke the substantive rights contained in the Covenant, they were not required, for purposes of the Optional Protocol, necessarily to do so by reference to specific articles of the Covenant").

⁴⁸ See Optional Protocol, *supra* note 21, art. 5(2)(a) ("The Committee shall not consider any communication from an individual unless it has ascertained that . . . the same matter is not being examined under another procedure of international investigation or settlement. . . .").

⁴⁹ See *Mahabir v. Austria*, Decision on Admissibility, Human Rights Comm., 82d Sess., No. 944/2000, ¶ 8.5, U.N. Doc. CCPR/C/82/D/944/2000 (2004) (showing how the various articles are very similar to each other); *Petersen v. Germany*, Decision on Admissibility, Human Rights Comm., 80th Sess., No. 1115/2002, ¶¶ 6.3, 6.5, U.N. Doc. CCPR/C/80/D/1115/2002 (2004) (illustrating the similarities between articles 14 and 17 of the Civil and Political Covenant to articles 6, 8, and 14 of the European Convention); *Rogl v. Germany*, Decision on Admissibility, Human Rights Comm., 70th Sess., No. 808/1998, ¶ 9.4, U.N. Doc. CCPR/C/70/D/808/1998 (2000) (showing the similarities between articles 14 and 17 of the Civil and Political Covenant to articles 6, 8, and 14 of the European Convention). *But see* *Lederbauer v. Austria*, Views, Human Rights Comm., 90th Sess., No. 1454/2006, ¶ 7.3, U.N. Doc. CCPR/C/90/D/1454/2006 (2007) (finding that Article 14 of the Civil and Political Covenant differs enough in scope and

Civil and Political Covenant to be proximate to Article 11(1) of the European Convention.⁵⁰ In contrast, the HRC has found that Article 26 of the Civil and Political Covenant is broader and provides greater protection than Article 14 of the European Convention.⁵¹

In many communications, rather than allege violations of other international instruments, authors cite those instruments as support for an alleged violation of the Civil and Political Covenant. Like the alleged direct violations, the HRC generally does not discuss the other international standards in these situations. In cases alleging violations of the Covenant that cite to other international instruments where the HRC finds no violation, the Committee does not refer to the other sources cited.⁵² Similarly, in the large majority of communications where the author supports an alleged violation of the Covenant by reference to other international or foreign instruments and the Committee finds a

jurisprudence from Article 6 of the European Convention to not constitute “the same matter”).

⁵⁰ See *Wallmann v. Austria*, Views, Human Rights Comm., 80th Sess., No. 1002/2001, ¶ 8.4, U.N. Doc. CCPR/C/80/D/1002/2001 (2004) (showing how these articles are similar).

⁵¹ See *Mahabir*, No. 944/2000, ¶ 8.5 (showing how, in regards to these articles, the Political Covenant is more protective than the European Convention); *Althammer v. Austria*, Views, Human Rights Comm., 78th Sess., No. 998/2001, ¶ 8.4, U.N. Doc. CCPR/C/78/D/998/2001 (2003) (“The Committee on earlier occasions has already decided that the independent right to equality and non-discrimination embedded in article 26 of the Covenant provides a greater protection than the accessory right to non-discrimination contained in article 14 of the European Convention.”). *But see Irschik v. Austria*, Decision on Admissibility, Human Rights Comm., 80th Sess., No. 990/2001, ¶ 8.3, U.N. Doc. CCPR/C/80/D/990/2001 (2004) (finding that property rights protected under Article 26 of the Civil and Political Covenant are similarly protected by Article 1 of Protocol No. 1 to the European Convention).

⁵² See *Queenan v. Canada*, Decision on Admissibility, Human Rights Comm., 84th Sess., No. 1379/2005, ¶ 3.3, U.N. Doc. CCPR/C/84/D/1379/2005 (2005) (citing as support the Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989); *Karawa v. Australia*, Decision on Admissibility, Human Rights Comm., 84th Sess., No. 1127/2002, ¶ 3.4, U.N. Doc. CCPR/C/84/D/1127/2002 (2005) (referring to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 [hereinafter European Convention]); *Celal v. Greece*, Decision on Admissibility, Human Rights Comm., 82d Sess., No. 1235/2003, ¶ 3.2, U.N. Doc. CCPR/C/82/D/1235/2003 (2004) (citing the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Aug. 27–Sept. 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1, at 112 [hereinafter Basic Principles] and jurisprudence of the European Court of Human Rights).

violation, the Committee performs its analysis based solely on the Civil and Political Covenant.⁵³ State parties also cite international instruments as support for their position, which the Committee similarly tends not to acknowledge.⁵⁴

1.1.2. *More Recent Utilization of International Instruments*

Despite its apparent reluctance to do so, the Committee has on occasion referenced various international instruments. Since 2003, the Committee has referenced such instruments with growing frequency, although it still remains an unusual occurrence.

The Committee first referenced another international instrument as support for its ruling in *Mukong v. Cameroon*, in which it sua sponte cited the UN Standard Minimum Rules for the Treatment of Prisoners (“Standard Minimum Rules”) as evidence of a violation of Article 7 of the Civil and Political Covenant.⁵⁵ This opinion led to a string of claims involving inhuman detention conditions citing the same UN document as support.⁵⁶ The

⁵³ See *Sathasivam v. Sri Lanka*, Views, Human Rights Comm., 93d Sess., No. 1436/2005, ¶¶ 3.6, 3.9, U.N. Doc. CCPR/C/93/D/1436/2005 (2008) (finding a violation of the Covenant based on its own jurisprudence, although the author cited as support the European Court of Human Rights, the Inter-American Court of Human Rights, and the U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Annex, Supp. No. 49, U.N. Doc. A/RES/43/173 (1988) [hereinafter *Detention Principles*]); *Alzery v. Sweden*, Views, Human Rights Comm., 88th Sess., No. 1416/2005, ¶¶ 4.23, 4.26-4.27, U.N. Doc. CCPR/C/88/D/1416/2005 (2006) (encouraging the Committee to follow approaches taken by the Committee Against Torture and the Committee of Ministers of the Council of Europe and citing *Refugees Convention*, *supra* note 39).

⁵⁴ See, e.g., *Ahani v. Canada*, Views, Human Rights Comm., 80th Sess., No. 1051/2002, ¶ 4.9, U.N. Doc. CCPR/C/80/D/1051/2002 (2004) (citing as support the *European Convention*, *supra* note 52).

⁵⁵ See *Mukong v. Cameroon*, Views, Human Rights Comm., 51st Sess., No. 458/1991, ¶ 9.3, U.N. Doc. CCPR/C/51/D/458/1991 (1994) (“[I]n accordance with Rules 10, 12, 17, 19 and 20 of the U.N. Standard Minimum Rules for the Treatment of Prisoners . . . , minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength . . . [are] minimum requirements which the Committee considers should always be observed.”); *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, Annex I A (1955) [hereinafter *Standard Minimum Rules*] (providing a minimum standard of care).

⁵⁶ See *Siewpersaud v. Trinidad and Tobago*, Views, Human Rights Comm., 81st Sess., No. 938/2000, ¶ 3.3, U.N. Doc. CCPR/C/81/D/938/2000 (2004) (noting

Committee, while finding violations in these cases, generally has not referred to the UN document.⁵⁷ The Committee did cite the

the string of claims on the inhuman detention conditions); *Lobban v. Jamaica, Views, Human Rights Comm., 80th Sess., No. 797/1998, ¶ 3.2, U.N. Doc. CCPR/C/80/D/797/1998 (2004)* (“The author alleges that he was locked up in his cell for up to 23 hours a day, that no mattress or bedding were provided, that no integral sanitation existed”); *Francis v. Trinidad and Tobago, Views, Human Rights Comm., 75th Sess., No. 899/1999, ¶ 3.5, U.N. Doc. CCPR/C/75/D/899/1999 (2002)* (alleging poor detention conditions); *R.S. v. Trinidad and Tobago, Views, Human Rights Comm., 74th Sess., No. 684/1996, ¶ 3.1, U.N. Doc. CCPR/C/74/D/684/1996 (2002)* (alleging “lack of psychiatric care” under the UN Standard Minimum Rules for the Treatment of Prisoners); *Evans v. Trinidad and Tobago, Views, Human Rights Comm., 77th Sess., No. 908/2000, ¶ 3.3, U.N. Doc. CCPR/C/77/D/908/2000 (1999)* (“The author claims that the inadequate conditions of confinement during his five years on death row constitute cruel, inhuman and degrading treatment”); *Finn v. Jamaica, Views, Human Rights Comm., 63d Sess., No. 617/1995, ¶¶ 3.2-3.3, U.N. Doc. CCPR/C/63/D/617/1995 (1998)* (complaining that abusive language and threats were made upon arrest, and that conditions in the prison were unsanitary because of a lack of bedding, a lack of soap and toilet paper, poor food and drink quality, little ventilation and a lack of medical treatment); *Shaw v. Jamaica, Views, Human Rights Comm., 62d Sess., No. 704/1996, ¶ 5.5 U.N. Doc. CCPR/C/62/D/704/1996 (1998)* (citing Resolution 1996/15 of the U.N. Economic and Social Council on “Safeguards Guaranteeing Protection of the Rights of those facing the Death Penalty”); *Deidrick v. Jamaica, Views, Human Rights Comm., 62d Sess., No. 619/1995, ¶ 3.2, U.N. Doc. CCPR/C/62/D/619/1995 (1998)* (“Counsel concludes that fundamental and basic requirements of the UN Standard Minimum Rules for the Treatment of Prisoners have not been met during the author’s detention at St. Catherine District Prison”).

⁵⁷ See, e.g., *Finn v. Jamaica, No. 617/1995, ¶ 9.2* (“Consequently, the Committee finds that in the circumstances where the State party has not provided any evidence in respect of the investigation it alleges to have carried out, due weight must be given to the author’s allegations. Accordingly, the Committee finds that there has been a violation of articles 7 and 10, paragraph 1, of the Covenant.”); *Shaw, No. 704/1996, ¶ 7.1* (concluding that “these conditions amount to a violation of articles 7 and 10, paragraph 1, of the Covenant” without mentioning the Standard Minimum Rules); *Deidrick, No. 619/1995, ¶ 9.3* (failing to make a decision with regard to alleged violations under the Standard Minimum Rules and mentioning only that “[i]n the committee’s opinion . . . [i]t finds that holding a prisoner in such conditions of detention constitutes inhuman treatment in violation of article 10, paragraph 1, and of article 7” of the Civil and Political Covenant).

UN document in one recent case⁵⁸ and in another instance noted that it considers these standards relevant.⁵⁹

Most notably, considering the issue of enforced disappearance, the Committee *sua sponte* referenced the definition provided by the Rome Statute of the International Criminal Court (ICC) and linked it to Articles 6, 7, 9, and 10 of the Civil and Political Covenant.⁶⁰ Since first referencing the ICC's definition, the Committee has consistently cited it for issues of enforced disappearance.⁶¹ More recently, the Committee also has cited *sua*

⁵⁸ See *Benhadj v. Algeria*, Views, Human Rights Comm., 90th Sess., No. 1173/2003, ¶ 8.5, U.N. Doc. CCPR/C/90/D/1173/2003 (2007) ("The Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, *inter alia*, the Standard Minimum Rules for the Treatment of Prisoners.").

⁵⁹ See *Baban v. Australia*, Views, Human Rights Comm., 78th Sess., No. 1014/2001, Notes ¶ 7, U.N. Doc. CCPR/C/78/D/1014/2001 (2003) ("The authors observe Third Committee of the General Assembly made express reference to the Standard Minimum Rules for the Treatment of Prisoners (1957) when dealing in 1958 with article 10 in draft. The Committee has considered these Rules relevant to article 10 in both its General Comment 21 and in its consideration of States parties' periodic reports under the Covenant.").

⁶⁰ See *Sarma v. Sri Lanka*, Views, Human Rights Comm., 78th Sess., No. 950/2000, ¶ 9.3, U.N. Doc. CCPR/C/78/D/950/2000 (2003) (referencing the definition provided by the Rome Statute); Rome Statute of the International Criminal Court art. 7(2)(i), July 17, 1998, 2187 U.N.T.S. 90 (demonstrating how the definition of enforced disappearance provided by the Rome Statute links to Articles 6, 7, 9, and 10 of the Civil and Political Covenant).

⁶¹ See *Sharma v. Nepal*, Views, Human Rights Comm., 94th Sess., No. 1469/2006, ¶ 7.4, U.N. Doc. CCPR/C/94/D/1469/2006 (2008) ("As to the alleged disappearance of the author's husband, the Committee recalls the definition of enforced disappearance in article 7, paragraph 2(i), of the Rome Statute of the International Criminal Court"); *El Hassy v. Libyan Arab Jamahiriya*, Views, Human Rights Comm., 91st Sess., No. 1422/2005, ¶ 6.6, U.N. Doc. CCPR/C/91/D/1422/2005 (2007) ("As to the alleged disappearance of the author's brother, the Committee recalls the definition of enforced disappearance in article 7, paragraph 2(i), of the Rome Statute of the International Criminal Court. . . ."); *Mohammed El Alwani v. Libyan Arab Jamahiriya*, Views, Human Rights Comm., 90th Sess., No. 1295/2004, ¶ 6.2, U.N. Doc. CCPR/C/90/D/1295/2004 (2007) ("The Committee recalls the definition of enforced disappearance in article 7, paragraph 2(i), of the Rome Statute of the International Criminal Court"); *Grioua v. Algeria*, Views, Human Rights Comm., 90th Sess., No. 1327/2004, ¶ 7.2, U.N. Doc. CCPR/C/90/D/1327/2004 (2007) ("The Committee recalls the definition of enforced disappearance in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court"); *Kimouche v. Algeria*, Views, Human Rights Comm., 90th Sess., No. 1328/2004, ¶ 7.2, U.N. Doc. CCPR/C/90/D/1328/2004 (2007) ("The Committee recalls the definition of enforced disappearance in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court").

sponte the Declaration on the Protection of All Persons from Enforced Disappearance⁶² and the International Convention for the Protection of All Persons from Enforced Disappearance.⁶³

In its Ninety-Fourth Session, for the first time, the HRC explicitly incorporated an author's citation to another international instrument as support for finding a violation of the Civil and Political Covenant. In the complaint of *Madoui v. Algeria*, the author cited the Declaration on the Protection of All Persons from Enforced Disappearance, and the Committee used it as support in finding a violation of Article 16.⁶⁴

In *Faure v. Australia*, the Committee had to determine the meaning of "forced or compulsory labor" under Article 8.⁶⁵ Responding to both parties' citations to International Labour Organization (ILO) instruments, the Committee stated: "While the definitions of the relevant ILO instruments may be of assistance in elucidating the meaning of the terms, it ultimately falls to the Committee to elaborate the indicia of prohibited conduct."⁶⁶ Without further reference to the ILO instruments, the Committee then performed a detailed analysis of the specific conduct

⁶² See generally Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. Doc. A/RES/47/133 (Feb. 12, 1993) (declaring forced disappearances an offense to human dignity, prohibiting any nation from practicing, permitting or tolerating forced disappearances and declaring violations to be criminal).

⁶³ See, e.g., Grioua, No. 1327/2004, ¶ 7.8 (citing article 1, paragraph 2, of the Declaration on the Protection of All Persons from Enforced Disappearance and article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance to establish the illegal nature of enforce disappearances); Kimouche, No. 1328/2004, ¶ 7.8 (citing the same). See generally International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N.Doc. A/RES/61/177 (Jan. 12, 2007) (asserting the illegality of enforced disappearances, defining the term, establishing measures to hold perpetrators criminally responsible and who should be held responsible, among other things).

⁶⁴ *Madoui v. Algeria*, Views, Human Rights Comm., 94th Sess., No. 1495/2006, ¶ 3.4, U.N. Doc. CCPR/C/94/D/1495/2006 (2008) ("As to article 16, the author believes that her son's forced disappearance is inherently a denial of the right to recognition everywhere as a person before the law. She cites the 18 December 1992 Declaration on the Protection of All Persons from Enforced Disappearance.").

⁶⁵ See *Faure v. Australia*, Views, Human Rights Comm., 85th Sess., No. 1036/2001, ¶ 7.5, U.N. Doc. CCPR/C/85/D/1036/2001 (2005) ("The Committee notes, moreover, that article 8, paragraph 3(c)(iv), of the Covenant exempts from the term 'forced or compulsory labour' such work or service forming part of normal civil obligations.").

⁶⁶ *Id.*

prohibited by the Civil and Political Covenant.⁶⁷ Therefore, while the Committee did not explicitly base its analysis on ILO instruments, it acknowledged that such instruments can illuminate Civil and Political Covenant protections.

In one complaint, the Committee cited *sua sponte* the 1951 Convention on the Status of Refugees as support in finding violations of Articles 17, 23, and 24.⁶⁸

In a complex complaint considered during its Ninety-Fourth Session, the Committee had to confront an apparent contradiction between a UN Security Council Resolution and rights protected by the Civil and Political Covenant.⁶⁹ Essentially, the authors of the complaint alleged that Belgium placed their names prematurely on a list pursuant to a Security Council resolution aimed at restricting activities of people associated with terrorism.⁷⁰ In the submission, the authors and Belgium engaged in a back-and-forth debate over international obligations. The authors claimed that a state could only avoid its duties under the Civil and Political Covenant if there were a public emergency, and that the general danger of terrorism did not meet Article 4's public emergency standard so as to allow Belgium to violate their rights.⁷¹ They claimed that because Belgium acted pursuant to the UN Security Council resolution and in contradiction of the Civil and Political Covenant, the Security Council resolution violated peremptory norms of international law established by the Civil and Political Covenant, and Belgium should have adhered to the Civil and Political Covenant.⁷² Belgium responded that the HRC had no jurisdiction to consider

⁶⁷ *Id.*

⁶⁸ See *El Dernawi v. Libyan Arab Jamahiriya*, Views, Human Rights Comm., 90th Sess., No. 1143/2002, ¶ 6.3, U.N. Doc. CCPR/C/90/D/1143/2002 (2007) (recognizing that the State's action was the sole barrier preventing the author from reuniting with his family in Switzerland, and that "the author . . . as a person granted refugee status under the 1951 Convention on the Status of Refugees, cannot reasonably be expected to return to his country"). See generally *Refugees Convention*, *supra* note 39 (establishing parameters for the just treatment of refugees).

⁶⁹ See *Sayadi v. Belgium*, Views, Human Rights Comm., 94th Sess., No. 1472/2006, ¶ 10.13, U.N. Doc. CCPR/C/94/D/1472/2006 (2008) ("[E]ven though the State party is not competent to remove the authors' names from the United Nations and European lists, it is responsible for the presence of the authors' names on those lists.").

⁷⁰ *Id.* ¶¶ 2.1-2.3.

⁷¹ *Id.* ¶¶ 3.13, 5.8.

⁷² *Id.* ¶ 5.7.

the validity of the Security Council resolution.⁷³ It further argued that it was required to abide by the UN Charter, that it had no responsibility for how the Security Council acted, and that it had to act pursuant to a Charter obligation rather than comply with a “lower-ranking obligation that runs counter to the Charter.”⁷⁴

The case was contentious: the HRC issued a majority decision along with more dissenting opinions than were filed in any previous decision. The majority view first stated:

While the Committee could not consider alleged violations of other instruments such as the Charter of the United Nations, or allegations that challenged United Nations rules concerning the fight against terrorism, the Committee was competent to admit a communication alleging that a State party had violated rights set forth in the Covenant, regardless of the source of the obligations implemented by the State party.⁷⁵

The Committee went on to state that it was “competent to consider the compatibility with the Covenant of the national measures taken to implement” a Security Council resolution.⁷⁶ Finding Belgium in violation of Articles 12 and 17, the Committee reaffirmed its obligation to act as a guarantor of rights protected by the Covenant.⁷⁷ The large amount of individual dissents varied over multiple procedural and substantive issues. This case, presented against a complex backdrop of international obligations and substantive issues, demonstrates that the HRC only tolerates derogations from the Civil and Political Covenant when they are taken pursuant to Article 4 of the Covenant.

1.2. International Humanitarian Law

The vast majority of individual communications submitted to the HRC do not arise from situations of armed conflict or declared states of emergency. As a result, most decisions are not immediately useful in determining the Committee’s approach to issues of international humanitarian law. Nonetheless, there are

⁷³ *Id.* ¶ 6.1.

⁷⁴ *Id.* ¶¶ 6.3, 8.1.

⁷⁵ *Id.* ¶ 7.2.

⁷⁶ *Id.* ¶ 10.6.

⁷⁷ *Id.*

some decisions that may indicate the extent to which the Committee would address allegations of such violations.

The Committee has considered some individual communications arising from situations resembling armed conflict. In a string of cases early in the Committee's jurisprudence, Uruguay replied to alleged Covenant violations by claiming that it had only taken necessary and prompt security measures.⁷⁸ The Committee rejected the Uruguayan government's claims, stating that Article 4 of the Covenant only allowed derogations under strictly defined circumstances and that some rights could never be derogated.⁷⁹ The HRC similarly rejected arguments by Colombia that it was necessary to suspend certain rights during "the existence of a state of siege in all the national territory" due to violent narcotics trafficking.⁸⁰ When South Korea claimed it needed to restrict its citizens' rights to defend against possible North Korean intrusions, the Committee replied that general national security threats were insufficient to suspend the

⁷⁸ See *Silva v. Uruguay, Views, Human Rights Comm.*, ¶ 8.2, No. 34/1978, 12th Sess., U.N. Doc. CCPR/C/OP/1 (1981) ("[T]he government of Uruguay has made reference to an emergency situation in the country which was legally acknowledged in a number of 'Institutional Acts.'"); *Sala de Touron v. Uruguay, Views, Human Rights Comm.*, 12th Sess., ¶ 8, No. 32/1978, U.N. Doc. CCPR/C/OP/1 (1984) ("The Government has referred to provisions of Uruguayan law, including the 'prompt security measures,' to justify its acts under the Covenant"); *Weisz v. Uruguay, Views, Human Rights Comm.*, 11th Sess., ¶ 8 No. 28/1978, U.N. Doc. CCPR/C/OP/1 (1984) (deciding a case in which Uruguay claimed that an arrestee was detained not for "his political beliefs or ideas or trade-union membership, but for having participated directly in subversive activities."); *Lanza de Netto v. Uruguay, Views, Human Rights Comm.*, 9th Sess., No. 8/1977, at 45, U.N. Doc. CCPR/C/OP/1 (1984) (deciding a case in which Uruguay claimed that the detainees were arrested "under the prompt security measures" and charged in military court "with the offense of 'subversive association'").

⁷⁹ See *Silva*, No. 34/1978, ¶ 8.3 ("A] state, by merely invoking the existence of exceptional circumstances, cannot evade the obligations, which it has undertaken by ratifying the Covenant."); *Sala de Touron*, No. 32/1978, ¶ 10 ("[T]he government has not made any submissions of fact or law to justify such derogation."); *Weisz*, No. 28/1978, ¶ 8 (detailing how arrestee was detained not for "his political beliefs or ideas or trade-union membership, but for having participated directly in subversive activities."); *Lanza de Netto*, No. 8/1977, ¶ 8 (noting that detainees were arrested "under the prompt security measures" and charged in military court "with the offense of 'subversive association.'").

⁸⁰ *Husband of Maria Fanny Suarez de Guerrero v. Colombia, Decision on Admissibility, Human Rights Comm.*, 37th Sess., No. R.11/45, ¶ 12.2, U.N. Doc. Supp. No. 40 (A/37/40) (1982).

Covenant's protections.⁸¹ The Committee has continued to maintain that a state cannot invoke national security to avoid the Committee's scrutiny.⁸²

The HRC also has clarified that the Article 1 statement, "individuals subject to [a State party's] jurisdiction," refers "not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred."⁸³ Consequently, the State party can be held liable for acts committed by its agents within another country's territory.⁸⁴

Therefore, in the situations most nearly approximating armed conflict, the HRC has firmly applied and upheld the Covenant's protections.

1.3. Summary

The Decisions and Views of the Committee, rendered in response to individual complaints under the Optional Protocol to the Civil and Political Covenant, present varied, and sometimes contradictory, responses. On the one hand, the Committee has remained fiercely loyal to its duty to consider only complaints alleging a violation of the Civil and Political Covenant. On the other hand, the Committee has slowly changed its approach, and now appears more willing to consider and utilize other international instruments when interpreting protections offered by the Covenant.

It appears that the Committee would not directly consider a claim under international humanitarian law unless that claim was couched in the protections offered by specific articles of the Civil and Political Covenant. While an individual communication could

⁸¹ See *Park v. Republic of Korea*, Views, Human Rights Comm., 64th Sess., No. 628/1995, ¶¶ 8.2, 10.3-10.4, U.N. Doc. CCPR/C/64/D/628/1995 (1998) ("[T]he State party has not made the declaration under article 4(3) of the Covenant that a public emergency existed and that it derogated certain Covenant rights on this basis.").

⁸² See *Tsarjov v. Estonia*, Views, Human Rights Comm., 91st Sess., No. 1223/2003, ¶ 7.3, U.N. Doc. CCPR/C/91/D/1223/2003 (2007) ("[T]he invocation of national security on the part of a State party does not, *ipso facto*, remove an issue wholly from the Committee's scrutiny. . . .").

⁸³ *Celiberti de Casariego v. Uruguay*, Views, Human Rights Comm., 13th Sess., No. 56/1979, ¶ 10.2, U.N. Doc. CCPR/C/OP/1 (1984).

⁸⁴ *Id.* ¶ 10.3.

cite international humanitarian law to support an alleged violation of a Covenant right, the Committee's reluctance to incorporate other international instruments explicitly into its decisions suggests that it would not recognize any violation of the Geneva Conventions. At best, the HRC may receive communications citing the Geneva Conventions as support for violations of the Civil and Political Covenant, but it would almost assuredly frame its opinion solely in terms of the latter.

The result is that when it comes to interpreting international humanitarian law jurisprudentially, the Committee has essentially bound itself to the explicit language of the Civil and Political Covenant. While there are important fundamental rights protected in this Covenant, rights that the Committee has demonstrated it is committed to upholding, its approach fails to address fully the protections of international humanitarian law. If an individual seeks redress through the HRC, he or she must ultimately demonstrate a violation of a substantive right prescribed in the Civil and Political Covenant.

This narrow focus has another consequence: by releasing opinions framed entirely within the language of the Civil and Political Covenant, the Committee's decisions lose precedential value for other bodies seeking to interpret international humanitarian law. In other words, the HRC's opinions are easily relegated to and contained within the Covenant. While the explanation for the limited holdings is that the HRC's explicit mandate is to consider only violations of the Civil and Political Covenant, the outcome is a disconcertingly narrow focus on a limited universe of human rights violations.

In sum, in its Optional Protocol jurisprudence, the HRC largely limits itself to considering violations of the Civil and Political Covenant. Where the Covenant overlaps with the Geneva Conventions, the Committee may decide and uphold individual international humanitarian law protections. Unfortunately, those decisions will be framed entirely within the language of the Covenant, and thus may have limited precedential appeal outside of the Covenant. Where the Covenant does not overlap with protections offered by the Geneva Conventions, the HRC provides no recourse and consequently no legal interpretations.

2. GENERAL COMMENTS

The HRC periodically produces General Comments designed to explicate specific protections offered by the Civil and Political Covenant. In marked contrast to the individual submissions, the HRC explicitly considers other international instruments in its General Comments. This Section considers the Committee's general approach to other international instruments, and then extrapolates from that approach the implications for interpreting international humanitarian law. While the HRC considers other international instruments in various contexts, it directly addresses the interplay between the Civil and Political Covenant and international humanitarian law when considering a state's obligations under Article 4. The HRC emphasizes that no state may invoke Article 4 to derogate from rights protected by other international obligations and that in situations of armed conflict, the Covenant and international humanitarian law are complementary, not exclusive. While such a position may—via an individual complaint alleging a violation of Article 4 during an armed conflict—require the Committee to consider all the state's international obligations (including those of international humanitarian law), it is unclear what form the Committee's analysis would actually take.

2.1. General Approach to Other International Instruments

In its General Comments, the HRC references other international instruments or obligations in four different contexts: (i) most relevant to international humanitarian law, when the HRC discusses possible derogation of rights protected by the Covenant, the Committee refers to other international obligations of State Parties; (ii) the HRC refers to other international standards when interpreting the articles of the Civil and Political Covenant that explicitly reference "international law;" (iii) the HRC occasionally refers to other international instruments to define terms or clarify obligations under the Civil and Political Covenant; and (iv) the HRC intermittently addresses states' international obligations beyond the scope of the Covenant. Each context will be discussed in turn.

2.1.1. *International Obligations Preventing Derogation*

Because Article 4(1) allows states to take measures derogating from some of their obligations under the Civil and Political Covenant, the Committee has sought to make clear that derogation is only permissible to the extent it is compatible with other international obligations. According to the HRC, Article 4 “cannot be read as justification for derogation . . . if such derogation would entail a breach of the state’s other international obligations, whether based on treaty or general international law.”⁸⁵ The HRC also refers to Article 5(2), which protects against derogation of fundamental rights recognized in other instruments.⁸⁶ The Committee takes an expansive view of other international obligations, referencing, for example, norms of general international law,⁸⁷ international humanitarian law,⁸⁸ crimes against humanity,⁸⁹ “principles of legality and the rule of law,”⁹⁰ various conventions and UN standards,⁹¹ and the report of the International Committee of the Red Cross on rules of international humanitarian law.⁹² Because a state may not derogate provisions representing customary international law, a state may never be able to derogate some provisions of the Civil and Political Covenant not listed in Article 4(2).⁹³

⁸⁵ Human Rights Comm., 72nd Sess., *General Comment 29: States of Emergency (Article 4)*, ¶ 9, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

⁸⁶ See Civil and Political Covenant, *supra* note 22, art. 5(2) (recognizing rights found in “law, conventions, regulations or custom”). See, e.g., *General Comment 29, supra* note 85, ¶ 9 (exploring the circumstances under which a state may derogate from the Convention); Human Rights Comm., 68th Sess., *General Comment 28: Equality of Rights Between Men and Women (Article 3)*, ¶ 9, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (discussing that there “shall be no derogation from the equal enjoyment by women of all fundamental human rights”).

⁸⁷ *General Comment 29, supra* note 85, ¶ 13 (providing illustrative examples of “elements that in the Committee’s opinion cannot be made subject to lawful derogation under article 4”).

⁸⁸ *Id.* ¶ 11.

⁸⁹ *Id.* ¶ 12 (including crimes codified by the Rome Statute of the International Criminal Court).

⁹⁰ *Id.* ¶ 16 (providing, as an example, elements of the right to a fair trial).

⁹¹ See *id.* ¶ 10 nn.5–6.

⁹² See *id.* ¶ 10 n.6.

⁹³ See *id.* ¶ 11 (“[T]he category of peremptory norms extends beyond the list of nonderogable provisions as given in article 4, paragraph 2.”); Human Rights Comm., 52nd Sess., *General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation*

General Comment 29 addresses the overlap between the Civil and Political Covenant and international humanitarian law. To justify state derogations from the Covenant, Article 4 requires that a public emergency threaten the life of a nation.⁹⁴ Such a situation will most likely arise during armed conflict.⁹⁵ Once an armed conflict exists, “rules of international humanitarian law become applicable and help . . . to prevent the abuse of a State’s emergency powers.”⁹⁶ In other words, as the Committee expressed in General Comment 31, in situations of armed conflict, both the Covenant and international humanitarian law apply and “both spheres of law are complementary, not mutually exclusive.”⁹⁷ In General Comment 28, for example, the HRC applies the Covenant’s protections during armed conflict: it notes that women are

to *Declarations under Article 41 of the Covenant*, ¶8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994) (discussing, albeit in the context of invalid reservations, various provisions in the Covenant “that represent customary international law”).

⁹⁴ Civil and Political Covenant, *supra* note 22, art. 4(1).

⁹⁵ See *General Comment 29*, *supra* note 85, ¶ 3 (“If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.”).

⁹⁶ *Id.*

⁹⁷ Human Rights Comm., 80th Sess., *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). The International Court of Justice has also endorsed the principle of complementarity: “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 [Civil and Political Covenant].” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9). See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8) (alluding to the principle of complementarity). While complementarity is the predominant view among commentators, both advisory opinions are controversial as to their characterization of the relationship between the two bodies of law. See Lori Fisler Damrosch & Bernard H. Oxman, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 AM. J. INT’L L. 1, 5–6 (2005) (indicating the generality with which the decision was decided and its lack of specificity regarding these two areas of law); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT’L L. 119, 133–37 (2005) (stating the interplay between humanitarian and human rights law remains unclear); Terry Gill, *The Nuclear Weapons Advisory Opinion of the International Court of Justice and the Fundamental Distinction Between the Jus ad Bellum and the Jus in Bello*, 12 LEIDEN J. INT’L L. 613, 616–19 (1999) (analyzing the court’s discussion regarding the compatibility of nuclear weapons with *Jus ad Bellum*).

particularly vulnerable in such situations and suggests that State parties take preventive measures under Article 3 to protect them.⁹⁸

To evaluate states' claims of an emergency necessitating derogation, the HRC deems itself competent to consider states' other international obligations.⁹⁹ It requests states, therefore, to take into account "the developments within international law as to human rights standards applicable in emergency situations."¹⁰⁰ Therefore, while Article 4(2) provides a list of nonderogable rights protected by the Civil and Political Covenant, if a state attempts to avoid other Covenant obligations under the claim of a national emergency, the Committee will look beyond the four corners of the Covenant to determine whether the state has complied with all of its international obligations.¹⁰¹

2.1.2. *The Covenant's Explicit References to International Law*

The Civil and Political Covenant explicitly refers to obligations under international law in Articles 1 and 4.¹⁰² In order for the HRC to discuss fully the rights protected by those articles, therefore, the Committee must address other international obligations relevant to the protected right. In General Comment 12, discussing the right of self-determination protected by Article 1, the Committee referred to the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (General Assembly

⁹⁸ See *General Comment 28, supra* note 86, ¶ 8 (describing the obligations states have toward women under Article 3 of Covenant).

⁹⁹ General Comment 29 states:

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

General Comment 29, supra note 85, ¶ 10.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* ¶ 13 (analyzing various other Covenant provisions not listed in Article 4(2) and concluding that each is protected by other areas of international law and that consequently a State could never derogate from those provisions).

¹⁰² Civil and Political Covenant, *supra* note 22, arts. 1, 4.

resolution 2625 (XXV)).¹⁰³ Similarly, for Article 4, the HRC states that the state cannot breach other international obligations, “whether based on treaty or general international law.”¹⁰⁴

2.1.3. *Looking to Other Instruments to Define Covenant Provisions*

In two of its General Comments, the HRC has looked to other international instruments to clarify Covenant provisions. In General Comment 18, the HRC sought to define “discrimination.”¹⁰⁵ Noting that the Covenant provided no definition, the HRC consulted the definitions of discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination¹⁰⁶ and the Convention on the Elimination of All Forms of Discrimination against Women.¹⁰⁷ The Committee then discussed the purpose of the Civil and Political Covenant’s prohibition of discrimination, and combined pieces of the other conventions’ definitions to construct its own.¹⁰⁸

¹⁰³ Human Rights Comm., 21st Sess., *General Comment 12: The Right to Self-Determination of Peoples (Article 1)*, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 (Mar. 13, 1994). *But see* Wilson v. Australia, Decision, Human Rights Comm., 80th Sess., No. 1239/2004, ¶ 4.3, U.N. Doc. CCPR/C/80/D/1239/2004 (2004) (stating that an individual cannot claim the status of a victim through Article 1).

¹⁰⁴ *General Comment 29*, *supra* note 85, ¶ 9.

¹⁰⁵ Human Rights Comm., 37th Sess., *General Comment 18: Non-discrimination*, ¶ 6, U.N. Doc. HRI/GEN/1/Rev.1 (Nov. 10, 1989) [hereinafter *General Comment 18*].

¹⁰⁶ *See* International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter *Race Discrimination Convention*] (condemning racial discrimination and committing to take certain actions to eliminate it).

¹⁰⁷ *General Comment 18* states:

The Committee notes that the Covenant neither defines the term “discrimination” nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides [a definition for] the term “racial discrimination” Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides [a definition for] “discrimination against women”

General Comment 18, *supra* note 105, ¶ 6. *See also* Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (condemning discrimination against women, committing to eliminate such discrimination, and enumerating certain actions to be taken).

¹⁰⁸ *See General Comment 18*, *supra* note 105, ¶ 7 (defining discrimination).

In General Comment 21, the Committee considered humane treatment of those deprived of their liberty.¹⁰⁹ Rather than craft its own definition of specific protections offered by Article 10, the HRC provided the general purpose of Article 10 and encouraged states to look to other listed relevant United Nations standards.¹¹⁰

2.1.4. *Broad International Obligations*

The Committee has twice used an article of the Civil and Political Covenant as a vehicle to express a much broader view about states' international obligations. In General Comment 14 addressing the Article 6 right to life, the HRC described at length the danger of nuclear weapons.¹¹¹ The Committee concluded that the "production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity" and called upon all states, whether parties to the Covenant or not, to rid the world of nuclear weapons.¹¹²

In General Comment 17, the Committee addressed the specific children's rights protected by Article 24.¹¹³ The HRC noted that while the primary purpose of the article is to protect children's civil and political rights, states should also take positive actions to address children's economic, social, and cultural rights.¹¹⁴

2.2. *Implications for the Interpretation of International Humanitarian Law*

In various contexts, the HRC must consider other international obligations. Whether insisting that no state may use Article 4(1) of the Covenant to avoid other obligations under international law or interpreting the explicit references in the Covenant to "international law," the HRC must be ready to evaluate alleged

¹⁰⁹ See Human Rights Comm., 44th Sess., *General Comment 21: Replaces General Comment 9 Concerning Humane Treatment of Persons Deprived of Liberty (Article 10)*, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 10, 1992) (considering humane treatment in the context of Article 10).

¹¹⁰ *Id.* ¶¶ 4-5.

¹¹¹ See Human Rights Comm., 23rd Sess., *General Comment 14: Nuclear Weapons and the Right to Life (Article 6)*, ¶¶ 3-7, U.N. Doc. HRI/GEN/1/Rev.1 (Nov. 9, 1984) (describing the threat of nuclear weapons).

¹¹² *Id.* ¶¶ 6-7.

¹¹³ See Human Rights Comm., 35th Sess., *General Comment 17: Rights of the Child (Article 24)*, Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 7, 1984).

¹¹⁴ *Id.* ¶ 3.

violations of the Covenant against the backdrop of states' other international obligations. The Committee has expressly recognized this logic: "Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account. . . ."¹¹⁵

Nowhere is this duty more evident and necessary than in situations of armed conflict. As the Committee recognizes, it is in situations of armed conflict that a state is most likely to derogate rights protected by the Covenant.¹¹⁶ When a state derogates such a right during armed conflict, the Committee must consider not only whether the right may be derogated under the explicit terms of the Civil and Political Covenant, but also whether the state can permissibly derogate the right under the rules and principles of international humanitarian law, customary international law, and other relevant obligations. If such a situation were to arise—for example, if an individual alleged under the Optional Protocol that a state had violated his or her rights under Article 4(1)—the HRC would be required to consider the entire gamut of the state's international obligations, including all the protections of international humanitarian law.¹¹⁷ Conceptually, therefore, the HRC could be called upon to perform a detailed analysis of international humanitarian law protections.

¹¹⁵ *General Comment 29*, *supra* note 85, ¶ 10.

¹¹⁶ *Id.* ¶ 3.

¹¹⁷ See *General Comment 31*, *supra* note 97, ¶ 11 ("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."). While the HRC's consideration of the overlap between humanitarian and human rights law may be born of procedural necessity given Article 4's reference to "international law," the growing convergence of the two bodies of law is widely recognized. See, e.g., Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *ISR. L. REV.* 310, 310 (2007) (discussing historical developments leading to the increasing overlap of the two bodies of law); Theodor Meron, *The Humanization of Humanitarian Law*, 94 *AM. J. INT'L L.* 239, 266-73 (2000) (describing the impact of human rights on the development of humanitarian law and the growing convergence of the two spheres); Michael Bothe, *International Human Rights and Humanitarian Law by Rene Provost*, 98 *AM. J. INT'L L.* 371, 383 (2004) (reviewing RENE PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* (2002)). The HRC's consideration of humanitarian law, therefore, would be a natural step in this direction.

The secondary issue, however, is the form that such an analysis would take. While the General Comments recognize that a state's various international obligations are complementary rather than exclusive, they contain little by way of analysis of other international obligations. General Comment 29 provides some examples of how certain rights not listed in Article 4(2) may not be derogated, but most examples simply state that the protected right is a norm of general international law.¹¹⁸ Such a statement is instructive as to the level of protection offered by the provision, but does not provide any analysis of international humanitarian law. Therefore, if the Committee provides any detailed analysis of international humanitarian law, it would most likely do so in an individual communication under the Optional Protocol, rather than a General Comment.

The Committee's tendency to rest its Decisions and Views within the language of the Covenant, as well as its reluctance to consider or analyze other international instruments explicitly, however, make it probable that the Committee would couch its conclusion within the language of the Covenant. This likelihood illustrates the inherent tension in the HRC's jurisprudence: The Committee recognizes the Optional Protocol's purpose as allowing it to consider only alleged violations of substantive Covenant rights, but some provisions of the Covenant inherently demand that it scrutinize other international obligations.¹¹⁹ The result, therefore, would likely be that in its response to an individual communication alleging a violation of Article 4, the Committee would base its holding on a provision of the Civil and Political Covenant, and not provide any actual analysis of the state's obligations under international humanitarian law. To reach such a conclusion, the Committee should consider the state's international obligations, but even if it did, it would still probably frame its analysis within the language of the Covenant.

For example, imagine an individual alleged a violation of Article 4 of the Covenant based on a claim that the State party had, in a situation of internal armed conflict, derogated the right to

¹¹⁸ See *General Comment 29*, *supra* note 85, ¶ 13 (listing examples of certain rights that cannot be derogated).

¹¹⁹ Compare *General Comment 24*, *supra* note 93, ¶ 13 (describing the object and purpose of the Optional Protocol), with *General Comment 29*, *supra* note 85, ¶ 10 (stating the necessity of considering other international obligations for purposes of alleged Article 4 violations).

humane treatment protected by Article 10. Article 4(2) does not list Article 10 as a nonderogable provision.¹²⁰ Yet Common Article 3 of the Geneva Conventions prohibits humiliating and degrading treatment.¹²¹ Therefore, according to Article 4(1) and the HRC's General Comments, the state could not invoke Article 4 to derogate rights protected by other international obligations, which, in this example, would be a right protected by Common Article 3. Assuming the Committee found that there was a state of emergency within the country that met the requirements of Article 4(1) (in itself a high standard to satisfy),¹²² the Committee would have to find that the state could not derogate Article 10 through Article 4.

What form would the HRC's Decision and View take? It is possible that the Committee would explicitly reference Common Article 3, apply it to the facts alleged, and conclude that the State party could not derogate Article 10 through Article 4. Such a

¹²⁰ For the sake of this example, imagine that the Committee had not already stated in General Comment 29 that Article 10 is nonderogable under general international law. See *General Comment 29*, *supra* note 85, ¶ 13(a) ("Although this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of nonderogable rights in article 4, paragraph 2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation.").

¹²¹ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31:

[T]he following acts are and shall remain prohibited at any time and in any place whatsoever with respect to [persons taking no active part in the hostilities during an armed conflict not of international character occurring in the territory of one of the High Contracting Parties]: . . . (c) outrages upon personal dignity, in particular humiliating and degrading treatment . . .

Id.; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (prohibiting, with the same language as that found in Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, any outrages upon personal dignity towards persons); Third Geneva Convention, *supra* note 8, art. 3 (employing the same language as Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, to the same purpose); Fourth Geneva Convention, *supra* note 8, art. 3 (applying the same language again to prisoners of war).

¹²² See *General Comment 29*, *supra* note 85, ¶ 3 ("Even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.").

holding would provide an informative analysis of international humanitarian law. More likely, however, the Committee would state nearly exactly what it did in General Comment 29 when considering whether Article 10 could be derogated: “[T]he Committee believes here the Covenant expresses a norm of general international law not subject to derogation.”¹²³ Such a conclusory statement, while contributing to the general recognition of customary norms, does not provide much actual precedential analysis of international humanitarian law.

3. CONCLUDING OBSERVATIONS

The HRC renders Concluding Observations based on country reports it periodically receives from States parties, pursuant to Article 40 of the Civil and Political Covenant.¹²⁴ Unlike the individual communications, issues of international humanitarian law frequently arise in the Concluding Observations. This tendency may be because it is through the periodic reports that State parties must justify states of emergency or situations of human rights abuses. There are also a larger number of countries that are signatories to the Covenant and thereby required to submit periodic reports than countries that have ratified the Optional Protocol, allowing individuals subject to their jurisdiction to submit communications. Perhaps most significantly, however, it is the Committee’s approach to evaluating compliance with the Covenant that leads it to consider humanitarian law explicitly.

The Committee has interpreted its mandate with respect to the country reports¹²⁵ as an opportunity to provide a bird’s-eye view of the human rights situation in the State party vis-à-vis its compliance with the Covenant. This approach permits the Committee to reach outside the Covenant in assessing State parties’ implementation and compliance. The Concluding Observations, therefore, offer the Committee’s most extensive and explicit consideration of the relation between the Civil and Political Covenant and the protections offered by international

¹²³ *Id.* ¶ 13(a).

¹²⁴ See Civil and Political Covenant, *supra* note 22, art. 40 (requiring States parties to submit reports and authorizing the Human Rights Committee to render observations).

¹²⁵ “The Committee shall study the reports submitted by the States Parties. . . . It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties.” *Id.*

humanitarian law. This Part considers the HRC's approach to reviewing country reports, assesses its resulting treatment of humanitarian law, and finds that while the Committee recognizes the applicability of humanitarian law, its Concluding Observations offer little substantive analysis of the regime.

3.1. *Contextualizing the Covenant: The HRC's Approach to Assessing Periodic Reports*

The Concluding Observations reveal the Committee's willingness to look beyond the Covenant to capture a fuller picture of the state of human rights in the State party. The Committee thus often refers generally to other human rights instruments, norms, and standards.¹²⁶ It also refers specifically to other international

¹²⁶ See Human Rights Comm., 89th Sess., *Concluding Observations of the Human Rights Comm.: Madagascar*, ¶ 19, U.N. Doc. CCPR/C/MDG/CO/3 (May 11, 2007) ("The State party should define torture in its legislation, taking into account internationally established norms. . ."); Human Rights Comm., 83d Sess., *Concluding Observations of the Human Rights Comm.: Kenya*, ¶ 3, U.N. Doc. CCPR/CO/83/KEN (Apr. 29, 2005) ("The Committee welcomes the fact that the State party's new draft constitution includes a proposed Bill of Rights that is inspired by international human rights standards"); Human Rights Comm., 79th Sess., *Concluding Observation of the Human Rights Comm.: Latvia*, ¶ 4, U.N. Doc. CCPR/CO/79/LVA (Dec. 1, 2003) (noting court rulings "removing from the national legal system norms conflicting with international human rights standards"); Human Rights Comm., 72d Sess., *Concluding Observations of the Human Rights Comm.: Guatemala*, ¶ 15, U.N. Doc. CCPR/CO/72/GTM (Aug. 27, 2001) (noting that the State party should "take the appropriate measures to comply with the provisions of international instruments on child labor"); Human Rights Comm., 71st Sess., *Concluding Observations of the Human Rights Comm.: Venezuela*, ¶ 15, U.N. Doc. CCPR/CO/71/VEN (Apr. 26, 2001) ("All law enforcement officials should be thoroughly trained in international human rights standards, particularly those contained in [arts. 6, 7, and 10 of the] Covenant"); Human Rights Comm., 68th Sess., *Concluding Observations of the Human Rights Comm.: Guyana*, ¶ 10, U.N. Doc. CCPR/C/79/Add.121 (Apr. 25, 2000) ("The Committee also welcomes frequent references to provisions of international human rights instruments by the courts"); Human Rights Comm., 60th Sess., *Concluding Observations of the Human Rights Comm.: India*, ¶ 6, U.N. Doc. CCPR/C/79/Add.81 (Aug. 4, 1997) (welcoming "frequent references to provisions of international human rights instruments" by national courts); Human Rights Comm., 54th Sess., *Concluding Observations of the Human Rights Comm.: Sri Lanka*, ¶ 13, U.N. Doc. CCPR/C/79/Add.56 (July 27, 1995) (emphasizing that obligations assumed by the State party under "various international instruments" must be respected even in times of emergency); Human Rights Comm., *Concluding Observations of the Human Rights Comm.: Iceland*, ¶ 6, U.N. Doc. CCPR/C/79/Add.26 (Nov. 3, 1993) (noting with concern that Iceland's constitution lacks provisions to protect "all fundamental human rights as recognized in the numerous international human rights treaties, in particular in the [Civil and Political Covenant]"); Human Rights Comm., 48th Sess., *Concluding*

instruments, particularly, though not exclusively, as they relate to the application of Covenant rights.¹²⁷ Such references range from mere mention¹²⁸ to use of the document as support in making a recommendation¹²⁹ to the intimation that compliance with the cited

Observations of the Human Rights Comm.: Hungary, ¶ 5, U.N. Doc. CCPR/C/79/Add.22 (Aug. 3, 1993) (“The Committee . . . recognizes that much remains to be done, especially in the fields of education and training to better familiarize judges, practicing lawyers, law-enforcement officials, and the public at large with the rights enshrined in the Covenant.”).

¹²⁷ See, e.g., Human Rights Comm., 88th Sess., *Concluding Observations of the Human Rights Comm.: Honduras*, ¶ 3, U.N. Doc. CCPR/C/HND/CO/1 (Dec. 13, 2006) (welcoming State party’s ratification of the Rome Statute and accession to the Race Discrimination Convention, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and other treaties); Human Rights Comm., 64th Sess., *Concluding Observations of the Human Rights Comm.: Iceland*, ¶¶ 6, 8, U.N. Doc. CCPR/C/79/Add.98 (Nov. 6, 1998) (noting that domestic legislation prefers the European Convention over the ICCPR though the latter protects more rights).

¹²⁸ These references often come in the form of the Committee welcoming the State party’s accession to or ratification of a treaty or noting attempts to enact domestic legislation in line with the State party’s international obligations. See, e.g., Human Rights Comm., 87th Sess., *Concluding Observations of the Human Rights Comm.: Kosovo (Serbia)*, ¶ 7, U.N. Doc. CCPR/C/UNK/CO/1 (Aug. 14, 2006) (noting incorporation into domestic law of crimes as defined in the Rome Statute and the CAT); Human Rights Comm., 85th Sess., *Concluding Observations of the Human Rights Comm.: Paraguay*, ¶ 4, U.N. Doc. CCPR/C/PRY/CO/2 (Apr. 24, 2006) (welcoming ratification of CAT, the Rome Statute, and other international instruments); Human Rights Comm., 65th Sess., *Concluding Observations of the Human Rights Comm.: Costa Rica*, ¶ 21, U.N. Doc. CCPR/C/79/Add.107 (Apr. 8, 1999) (noting domestic legislation to implement the Race Discrimination Convention and ILO Convention No. 169); Human Rights Comm., 64th Sess., *Concluding Observations of the Human Rights Comm.: Austria*, ¶ 7, U.N. Doc. CCPR/C/79/Add.103 (Nov. 19, 1998) (noting that the European Convention has been incorporated into the Austrian Constitution).

¹²⁹ See Human Rights Comm., 94th Sess., *Concluding Observations of the Human Rights Comm.: Spain*, ¶ 13, U.N. Doc. CCPR/C/ESP/CO/5 (Jan. 5, 2009) (recommending that State party “speed up the process of adopting a national mechanism for the prevention of torture in accordance with the Optional Protocol to the [CAT]”); Human Rights Comm., 91st Sess., *Concluding Observations of the Human Rights Comm.: Georgia*, ¶ 10, U.N. Doc. CCPR/C/GEO/CO/3 (Nov. 15, 2007) (recommending establishment of a national mechanism for torture prevention per the Optional Protocol to the CAT); Human Rights Comm., 87th Sess., *Concluding Observations of the Human Rights Comm.: Central African Republic*, ¶ 13, U.N. Doc. CCPR/C/CAF/CO/2 (July 27, 2006) (relying on the Rome Statute, *supra* note 11, in urging State party not to extend the death penalty to new crimes); Human Rights Comm., 84th Sess., *Concluding Observations of the Human Rights Comm.: Yemen*, ¶ 7, U.N. Doc. CCPR/CO/84/YEM, (Aug. 9, 2005) (“The State party should work towards establishing a national human rights institution in accordance with the Principles relating to the status of national institutions for the promotion and protection of human rights”); Human Rights Comm., 60th Sess., *Concluding Observations of the Human Rights Comm.: France*, ¶ 16, U.N. Doc.

instrument is a necessary component of fulfilling the State party's substantive obligations under the Civil and Political Covenant.¹³⁰ The Committee has also referenced international agreements to recommend that states become parties to them, with a view to fulfilling their Covenant obligations.¹³¹

The Committee's reliance on several U.N. non-treaty documents is particularly pronounced and noteworthy for the extent to which the Committee has connected compliance with their provisions to fulfillment of a State party's Covenant obligations. In thirty-eight Concluding Observations,¹³² the

CCPR/C/79/Add.80 (Aug. 4, 1997) ("The Committee urges the State party to introduce law enforcement training along the lines suggested in the United Nations training manual for law enforcement officers.").

¹³⁰ See Human Rights Comm., 71st Sess., *Concluding Observations of the Human Rights Comm.: Dominican Republic*, ¶ 15, U.N. Doc. CCPR/CO/71/DOM (Apr. 26, 2001) ("To comply with article 10 of the Covenant, the State party needs to establish as soon as possible a specialized prison guard service . . . that meets the [Standard Minimum Rules] . . ."); Human Rights Comm., 57th Sess., *Concluding Observations of the Human Rights Comm.: Nigeria*, ¶ 19, U.N. Doc. CCPR/C/79/Add.65 (July 24, 1996) ("The Committee emphasizes that it is incompatible with the Covenant to hold prisoners under conditions which do not meet the basic guarantees provided in article 10 of the Covenant as well as in the [Standard Minimum Rules]").

¹³¹ See Human Rights Comm., 86th Sess., *Concluding Observations of the Human Rights Comm.: Congo*, ¶ 6, U.N. Doc. CCPR/C/COD/CO/3 (Apr. 26, 2006) ("The Committee recommends that the State party should endorse the draft law on the implementation of the Rome Statute, and ratify and enforce the Agreement on the Privileges and Immunities of the International Criminal Court."); Human Rights Comm., 55th Sess., *Concluding Observations of the Human Rights Comm.: Estonia*, ¶ 35, U.N. Doc. CCPR/C/79/Add.59 (Nov. 9, 1995) (suggesting that Estonia accede to the Refugees Convention, in connection with bringing its treatment of asylum-seekers into compliance with the Covenant); Human Rights Comm., 49th Sess., *Concluding Observations of the Human Rights Comm.: Japan*, ¶ 16, U.N. Doc. CCPR/C/79/Add.28 (Nov. 5, 1993) (recommending that Japan become party to the CAT).

¹³² See, e.g., Human Rights Comm., 87th Sess., *Concluding observations of the Human Rights Comm.: Central African Republic*, ¶ 15, U.N. Doc. CCPR/C/CAF/CO/2 (July 27, 2006) ("The State party should ensure that the conditions of detention in the country's prisons are compatible with the Standard Minimum Rules"); Human Rights Comm., 86th Sess., *Concluding observations of the Human Rights Comm.: Democratic Republic of the Congo*, ¶ 20, U.N. Doc. CCPR/C/COD/CO/3 (Apr. 26, 2006) (noting that prison conditions threaten the protections offered by Article 10 and recommending State party ensure that conditions are compatible with the Standard Minimum Rules); Human Rights Comm., 82d Sess., *Concluding Observations of the Human Rights Comm.: Poland*, ¶ 12, U.N. Doc. CCPR/CO/82/POL (Dec. 2, 2004) (encouraging the state party to consider alternative forms of punishment in order to ensure compliance with Article 10); Human Rights Comm., 61st Sess., *Concluding Observations of the Human Rights Comm.: Jamaica*, ¶ 13, U.N. Doc. CCPR/C/79/Add.83 (Nov. 19, 1997)

Committee refers to or relies upon the U.N. Standard Minimum Rules for the Treatment of Prisoners.¹³³ The HRC has situated the Standard Minimum Rules within the protections offered by Article 10 such that it is likely to find that prison conditions failing to meet the Standard Minimum Rules violate that provision.¹³⁴ The Committee has similarly linked the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“Basic Principles”)¹³⁵ to the protections offered by Articles 6, 7, and 10.¹³⁶

(noting that some prison conditions, such as lack of sanitation, lighting, adequate diet, adequate staff training, and lack of visitation of prisoners, are incompatible with the Minimum Standard Rules and Article 10); Human Rights Comm., 56th Sess., *Concluding Observations of the Human Rights Comm.: Zambia*, ¶¶ 13, 25, U.N. Doc. CCPR/C/79/Add.62 (Apr. 3, 1996) (suggesting that urgent steps be taken to reduce the number of prisoners in order to comply with the Standard Minimum Rules and Article 10); Human Rights Comm., 50th Sess., *Concluding Observations of the Human Rights Comm.: Costa Rica*, ¶ 11, U.N. Doc. CCPR/C/79/Add.31 (Apr. 18, 1994) (recommending that measures be taken to strengthen the rights of detainees).

¹³³ See Standard Minimum Rules, *supra* note 55 (providing a minimum standard of care).

¹³⁴ See, e.g., Human Rights Comm., 71st Sess., *Concluding Observations of the Human Rights Comm.: Dominican Republic*, ¶ 15, U.N. Doc. CCPR/CO/71/DOM (Apr. 26, 2001) (“To comply with article 10 of the Covenant, the State party needs to establish as soon as possible a specialized prison guard service . . . that meets the [Standard Minimum Rules]”); Human Rights Comm., 66th Sess., *Concluding Observations of the Human Rights Comm.: Poland*, ¶ 16, U.N. Doc. CCPR/C/79/Add.110 (July 29, 1999) (“The State party should effectively improve facilities for prisoners so as to comply with the [Standard Minimum Rules]”); Human Rights Comm., 57th Sess., *Concluding Observations of the Human Rights Comm.: Nigeria*, ¶ 19, U.N. Doc. CCPR/C/79/Add.65 (July 24, 1996) (noting that the poor prison conditions are incompatible with Article 10 and the [Standard Minimum Rules]).

¹³⁵ See Basic Principles, *supra* note 52.

¹³⁶ See, e.g., Human Rights Comm., 88th Sess., *Concluding Observations of the Human Rights Comm.: Honduras*, ¶ 10, U.N. Doc. CCPR/C/HND/CO/1 (Dec. 13, 2006) (“Another cause for concern is the failure to apply in practice the Basic Principles on the use of force and firearms by law enforcement officials”); Human Rights Comm., 77th Sess., *Concluding Observations of the Human Rights Comm.: Estonia*, ¶ 12, U.N. Doc. CCPR/CO/77/EST (Apr. 15, 2003) (inviting State party to amend legislation “to ensure that the use of firearms is restricted by the principles of necessity and proportionality as reflected in paragraphs 9 and 16 of the [Basic Principles] (articles 7 and 10 of the Covenant)”); Human Rights Comm., 53d Sess., *Concluding Observations of the Human Rights Comm.: United States*, ¶ 32, U.N. Doc. CCPR/C/79/Add.50 (Apr. 7, 1995) (“The Committee urges that rules and regulations governing the use of weapons by the police and security forces be in full conformity with the United Nations’ Basic Principles”); Human Rights Comm., 51st Sess., *Concluding Observations of the Human Rights Comm.: Cyprus*, ¶ 18, U.N. Doc. CCPR/C/79/Add.39 (Aug. 3, 1994) (noting police instruction should be in conformity with the Covenant and the Basic Principles).

Less frequently, the HRC references other U.N. documents.¹³⁷ The Committee thus uses its Concluding Observations to reach outside the Covenant both to offer recommendations and to survey the Covenant's interaction with other human rights instruments.¹³⁸

As in its Decisions and Views, the Committee has explicitly addressed the relationship between the Civil and Political Covenant and the European Convention¹³⁹ in its Concluding Observations.¹⁴⁰ Unlike the Decisions and Views, however, the

¹³⁷ See, e.g., Human Rights Comm., 95th Sess., *Concluding Observations of the Human Rights Comm.: Sweden*, ¶ 14, U.N. Doc. CCPR/C/SWE/CO/6 (May 7, 2009) ("The State party should provide adequate training to prison officials on suicide prevention and assure observance of the Standard Minimum Rules for the Treatment of Prisoners and the Basic Principles for the Treatment of Prisoners"); Human Rights Comm., 90th Sess., *Concluding Observations of the Human Rights Comm.: Czech Republic*, ¶ 13, U.N. Doc. CCPR/C/CZE/CO/2 (Sept. 9, 2008) (referencing Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care); Human Rights Comm., 92nd Sess., *Concluding Observations of the Human Rights Comm.: The Former Yugoslav Republic of Macedonia*, ¶ 15, U.N. Doc. CCPR/C/MKD/CO/2 (Apr. 17, 2008) ("The State party should find durable solutions for all [internally displaced persons] in consultation with the remaining displaced persons and in accordance with the Guiding Principles on Internal Displacement"); Human Rights Comm., 64th Sess., *Concluding Observations of the Human Rights Comm.: Libyan Arab Jamahiriya*, ¶ 14, U.N. Doc. CCPR/C/79/Add.101 (Nov. 6, 1998) ("The Committee recommends that measures be taken to ensure full compliance with Article 14 of the Covenant as well as the United Nations Basic Principles on the Independence of the Judiciary and the Basic Principles on the Roles of Lawyers"); Human Rights Comm., 54th Sess., *Concluding observations of the Human Rights Comm.: Russian Federation*, ¶¶ 35-36, U.N. Doc. CCPR/C/79/Add.54 (July 26, 1995) (recommending adoption of new rules to comply with the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and urging prompt enactment of legislation incorporating its Basic Principles on the Independence of the Judiciary).

¹³⁸ A statement made in response to a report from Uzbekistan typifies the Committee's approach: the HRC notes with interest a Supreme Court decision providing that domestic anti-torture laws must be interpreted in light of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but expresses concern "at the apparently narrow definition of torture in the State party's Criminal Code." Human Rights Comm., 83^d Sess., *Concluding Observations of the Human Rights Comm.: Uzbekistan*, ¶ 9, U.N. Doc. CCPR/CO/83/UZB (Apr. 26, 2005).

¹³⁹ See European Convention, *supra* note 52.

¹⁴⁰ See, e.g., Human Rights Comm., 91st Sess., *Concluding Observations of the Human Rights Comm.: Austria*, ¶ 6, U.N. Doc. CCPR/C/AUT/CO/4 (Oct. 30, 2007) (urging the State party to ensure that "judges and law enforcement officers receive adequate training to apply and interpret domestic law in light of the Covenant"); Human Rights Comm., 83^d Sess., *Concluding Observations of the Human Rights Comm.: Iceland*, ¶ 9, U.N. Doc. CCPR/CO/83/ISL (Apr. 25, 2005) ("The Committee encourages the State party to ensure that all rights protected under the Covenant

Concluding Observations are concerned with the aggregate protections offered by the respective treaty regimes, not with the similarity of particular claims.¹⁴¹ The Committee has made clear that the Civil and Political Covenant offers a wider range of protection than the European Convention.¹⁴²

In several Concluding Observations, the Committee has also referenced pronouncements by other international bodies in assessing compliance with the Covenant. In response to a report from Nicaragua, the Committee cited Articles 25 and 27 of the

are given effect in Icelandic law); Human Rights Comm., 64th Sess., *Concluding Observations of the Human Rights Comm.: Austria*, ¶ 7, U.N. Doc. CCPR/C/79/Add.103 (Nov. 19, 1998) (recommending that the State party ensure that all rights protected under the Covenant are given effect); Human Rights Comm., 64th Sess., *Concluding Observations of the Human Rights Comm.: Iceland*, ¶ 8, U.N. Doc. CCPR/C/79/Add.98 (Nov. 6, 1998) (encouraging the State party to give effect to all rights protected under the Covenant); Human Rights Comm., 58th Sess., *Concluding Observations of the Human Rights Comm.: Denmark*, ¶ 11, U.N. Doc. CCPR/C/79/Add.68 (Nov. 18, 1996) (expressing concern that the Covenant has not been given the status of domestic legislation); Human Rights Comm., 47th Sess., *Concluding Observations of the Human Rights Comm.: Belgium*, ¶ 6, U.N. Doc. CCPR/C/79/Add.3 (Sept. 25, 1992) (“The Committee recommends to the State party more adequately to reflect in internal administrative practice the provisions of the Covenant which are not reflected in the European Convention for the Protection of Human Rights and Fundamental Freedoms”).

¹⁴¹ Where an individual brings claims before both the European Court of Human Rights and the HRC under the Optional Protocol, the Committee must determine that the allegedly violated Covenant right is sufficiently distinct from the right protected by the European Convention for the communication to be admissible. See Section 1.1.1, *supra* (discussing the Committee’s approach to the question of overlap in its Decisions and Views).

¹⁴² See, e.g., Human Rights Comm., 95th Sess., *Concluding Observations of the Human Rights Comm.: Sweden*, ¶ 5, U.N. Doc. CCPR/C/SWE/CO/6 (May 7, 2009) (“[T]he Covenant may accord additional protection beyond what is accorded under the European Convention on Human Rights”); Human Rights Comm., 83d Sess., *Concluding Observations of the Human Rights Comm.: Iceland*, ¶ 9, U.N. Doc. CCPR/CO/83/ISL (Apr. 25, 2005) (noting that the European Convention has been incorporated into domestic law, but that such domestic incorporation does not satisfy Iceland’s Covenant obligations because “several Covenant provisions, including articles 4, 12, 22, 25 and 27, go beyond the scope of the ECHR”); Human Rights Comm., 64th Sess., *Concluding Observations of the Human Rights Comm.: Iceland*, ¶ 8, U.N. Doc. CCPR/C/79/Add.98 (Nov. 6, 1998) (“[T]he Committee emphasizes that a number of the articles of the Covenant, including articles 3, 4, 12, 22, 24, 25, 26, and 27, go beyond the provisions of the European Convention.”); Human Rights Comm., 49th Sess., *Concluding Observations of the Human Rights Comm.: Malta*, ¶ 9, U.N. Doc. CCPR/C/79/Add.29 (Nov. 5, 1993) (expressing concern at the apparent preference accorded to the European Convention in domestic law and noting that the Civil and Political Covenant “guarantees a number of human rights not protected under the European Convention”).

Covenant in observing¹⁴³ that the State party had not fully complied with a ruling by the Inter-American Court of Human Rights regarding indigenous communities' participation in elections.¹⁴⁴ In urging Macedonia to renew investigation of its involvement in the rendition of Khalid Al-Masri, the Committee referenced the concerns expressed by the Committee on the Elimination of Racial Discrimination, among other bodies.¹⁴⁵ The Committee similarly cited a decision of the European Court of Human Rights in criticizing UK legislation that prohibited convicted prisoners from voting.¹⁴⁶ Compared to the Committee's reliance on treaties and other international instruments, however, such references are rare. The HRC apparently references pronouncements of other international bodies only to support a finding that a State party has deviated from its substantive obligations under the Covenant.

3.2. *Treatment of International Humanitarian Law*

The Committee's approach to evaluating Covenant compliance has led it to consider international humanitarian law and armed conflict more frequently in its Concluding Observations than in its General Comments or individual decisions. The Committee repeatedly recognizes the adverse impact of armed conflict on the application of Covenant rights.¹⁴⁷ It has made clear, however, that

¹⁴³ See Human Rights Comm., 94th Sess., *Concluding Observations of the Human Rights Comm.: Nicaragua* ¶ 20, U.N. Doc. CCPR/C/NIC/CO/3 (Dec. 12, 2008) (noting that Nicaragua "should meet the targets laid down in [the decision]").

¹⁴⁴ See *Yatama v. Nicaragua*, case 12.388, Inter-Am. C.H.R. Report No. 125/01 (2005) (ruling that Nicaragua had violated equal suffrage).

¹⁴⁵ See Human Rights Comm., 92d Sess., *Concluding Observations of the Comm. on the Rights of the Child: The Former Yugoslav Republic of Macedonia*, ¶ 14, U.N. Doc. CCPR/C/MKD/CO/2 (Apr. 17, 2008) (noting concerns of the European Parliament's Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, the Council of Europe and citing Articles 2, 7, 9, 10 of the Civil and Political Covenant).

¹⁴⁶ See Human Rights Comm., 93d Sess., *Concluding Observations of the Comm. on the Rights of the Child: United Kingdom*, ¶ 28, U.N. Doc. CCPR/C/GBR/CO/6 (July 30, 2008) (citing Articles 10 and 25 of the Covenant); *Saadi v. Italy*, App. No. 37201/06, Eur. Ct. H.R. 1, 35 (2008) (criticizing the United Kingdom for its application of principles of Article 3).

¹⁴⁷ See, e.g., Human Rights Comm., 61st Sess., *Concluding Observations of the Comm. on the Rights of the Child: The Sudan*, ¶ 3, U.N. Doc. CCPR/C/79/Add.85 (Nov. 19, 1997) ("[T]he armed conflict is an obstacle to the full implementation of the Covenant."); Human Rights Comm., 54th Sess., *Concluding Observations of the*

under Articles 2(1) and 4, Covenant protections apply regardless of the applicability of the rules of international humanitarian law and that a State party is responsible for the actions of its agents, even beyond its territory.¹⁴⁸ The Committee also scrutinizes states' claims to a "state of emergency" and resulting derogations from Covenant protections.¹⁴⁹ This scrutiny, however, is typically

Comm. on the Rights of the Child: Sri Lanka, ¶ 3, U.N. Doc. CCPR/C/79/Add.56 (July 27, 1995) (noting that armed conflict "adversely affect[s] the application of the Covenant"); Human Rights Comm., 51st Sess., *Concluding Observations of the Comm. on the Rights of the Child: Azerbaijan*, ¶ 3, U.N. Doc. CCPR/C/79/Add.38 (Aug. 3, 1994) ("[T]he situation of armed conflict with a neighboring country and the recurrent internal unrest are affecting the exercise of human rights in Azerbaijan").

¹⁴⁸ See Human Rights Comm., *Concluding Observations of the Comm. on the Rights of the Child: Belgium*, ¶ 6, U.N. Doc. CCPR/CO/81/BEL (Aug. 12, 2004) ("[T]he Covenant automatically applies when [the State party] exercises power or effective control over a person outside its territory, regardless of the circumstances in which such power or effective control was obtained."); Human Rights Comm., *Concluding Observations of the Comm. on the Rights of the Child: Germany*, ¶ 11, U.N. Doc. CCPR/CO/80/DEU (May 4, 2004) ("[The Committee] reiterates that the applicability of the regime of international humanitarian law does not preclude accountability of State parties under [Article 2(i)] of the Covenant."); Human Rights Comm., *Concluding Observations of the Comm. on the Rights of the Child: Israel*, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 12, 2003) ("Nor does the applicability of the regime of international humanitarian law preclude accountability of State parties under [Article 2(i)] of the Covenant."); Human Rights Comm., *Concluding Observations of the Comm. on the Rights of the Child: Israel*, ¶ 10, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998) ("[The Committee] emphasizes that the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under [Article 2(i)].").

¹⁴⁹ E.g., Human Rights Comm., 81st Sess., *Concluding Observations of the Comm. on the Rights of the Child: Serbia and Montenegro*, ¶ 13, U.N. Doc. CCPR/CO/81/SEMO (Aug. 12, 2004) (expressing concern over the derogations taken during a state of emergency); Human Rights Comm., 88th Sess., *Concluding Observations of the Comm. on the Rights of the Child: Israel*, ¶ 12, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003) (expressing concern "about the sweeping nature of measures during the state of emergency" and finding that they derogated from Covenant protections "more extensively than what in the Committee's view is permissible pursuant to article 4"); Human Rights Comm., 72d Sess., *Concluding Observations of the Comm. on the Rights of the Child: Guatemala*, ¶ 11, U.N. Doc. CCPR/CO/72/GTM (Aug. 27, 2001) (expressing concern over the "wide variety of possible states of emergency listed in the Constitution"); Human Rights Comm., 71st Sess., *Concluding Observations of the Comm. on the Rights of the Child: Croatia*, ¶ 9, U.N. Doc. CCPR/CO/71/HRV (Apr. 30, 2001) (expressing concern that a constitutional provision is incompatible with Article 4 of the Covenant); Human Rights Comm., 63d Sess., *Concluding Observations of the Comm. on the Rights of the Child: Israel*, ¶ 11, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998) (recommending "the Government review the necessity for the continued renewal of the state of emergency with a view to limiting as far as possible its

limited to a pronouncement that, for example, emergency powers or derogations permitted by domestic law are “too broad” or “not in conformity” with Article 4.¹⁵⁰ Though it often refers to its General Comment 29 in this context, the HRC has not analyzed derogations in light of other international obligations, as intimated in that Comment and described above.¹⁵¹

In various Concluding Observations, the Committee ties Covenant provisions to the regime of international humanitarian law. For example, in response to the Central African Republic’s report, the Committee stated: “The Committee notes with concern that, to date, the authorities have not carried out any exhaustive and independent appraisal of serious violations of human rights and international humanitarian law in the Central African Republic and that the victims have received no reparations (arts. 2, 6 and 7).”¹⁵² In other words, the Committee placed “serious violations of human rights and international humanitarian law” into the protections offered by Articles 2, 6, and 7 of the Civil and Political Covenant. In the Sudan, the Committee noted widespread serious human rights violations in the context of armed conflict, and tied the violations to Articles 2, 3, 6, 7, and 12.¹⁵³ The Committee has similarly linked Serbia’s failure to fully cooperate with the ICTY in investigating and prosecuting violators of international humanitarian law with Article 2 of the Covenant.¹⁵⁴

scope and territorial applicability and the associated derogation of rights”); Human Rights Comm., *Comments of the Human Rights Comm.: Ireland*, ¶ 11, U.N. Doc. CCPR/C/79/Add.21 (Aug. 3, 1993) (stating that the continued existence of a special court established pursuant to emergency powers legislation is not “justified in the present circumstances” and that such measures “are of a character that normally fall to be notified under article 4 of the Covenant,” which the State party had not done).

¹⁵⁰ Human Rights Comm., 46th Sess., *Concluding Observations of the Human Rights Comm.: United Republic of Tanzania*, ¶ 7, U.N. Doc. CCPR/C/79/Add.12 (Dec. 28, 1992).

¹⁵¹ See *supra* Section 2.2 (discussing how the HRC has not analyzed derogations in light of other international obligations).

¹⁵² Human Rights Comm., 87th Sess., *Concluding Observations of the Human Rights Comm.: Central African Republic*, ¶ 8, U.N. Doc. CCPR/C/CAF/CO/2 (Jul. 27, 2006) (explaining how the authorities have not conducted any appraisals).

¹⁵³ See Human Rights Comm., 90th Sess., *Concluding Observations of the Human Rights Comm.: The Sudan*, *supra* note 147, ¶ 9 (noting the widespread serious human rights violations).

¹⁵⁴ See Human Rights Comm., *Concluding Observations of the Comm. on the Rights of the Child: Serbia and Montenegro*, *supra* note 149, ¶ 11:

Considering a report from Belgium, the Committee tied Articles 2, 5, 6, 7, 16, and 26 of the Covenant to “serious violations of international humanitarian law” and conduct “contrary to human rights.”¹⁵⁵ Specifically, the Committee expressed its concern with the repeal of a 1993 act that provided a legal remedy for breaches of international humanitarian law.¹⁵⁶ The HRC’s citation to Articles 2, 5, 16, and 26 suggests that the remedy also facilitated substantive Covenant rights, such as Article 2’s guarantee of an effective remedy for violations of “rights or freedoms as herein recognized.”¹⁵⁷ The implication is that the protections of international humanitarian law are also to be found within the various provisions of the Covenant. The Committee similarly found “credible and uncontested information” that the United States was secretly detaining people in violation of rights protected by Articles 7 and 9.¹⁵⁸ It stated that the United States should grant the International Committee of the Red Cross “prompt access to any person detained in connection with an armed conflict.”¹⁵⁹

In several Concluding Observations, the Committee notes as relevant the establishment of domestic mechanisms relating to international humanitarian law.¹⁶⁰ Considering a report from El

The Committee notes the State party’s public statements emphasizing its commitment to cooperate with the International Criminal Tribunal for the Former Yugoslavia (ICTY) in order to ensure that all persons suspected of grave human rights violations, including war crimes and crimes against humanity, are brought to trial. However, it remains concerned at the State party’s repeated failure to fully cooperate with ICTY, including with regard to the arrest of indictees (art. 2).

Id.

¹⁵⁵ Human Rights Comm., 81st Sess., *Concluding Observations of the Human Rights Comm.: Belgium*, *supra* note 148, ¶¶ 9-10.

¹⁵⁶ *See id.* ¶ 9 (stating that the State should guarantee the victim’s right to an effective remedy). *See generally* Luc Reydam, *Belgium Reneges on Universality: The August 2003 Act on Grave Breaches of International Humanitarian Law*, 1 J. INT’L CRIM. JUST. 5, 679 *passim* (2003) (describing the law and the changes brought on by the 2003 amendments).

¹⁵⁷ Civil and Political Covenant, *supra* note 22, art. 2(3).

¹⁵⁸ *See* Human Rights Comm., 87th Sess., *Concluding Observations of the Human Rights Comm.: United States of America*, ¶ 12, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) (urging the United States to cease its practice of secret detention).

¹⁵⁹ *Id.*

¹⁶⁰ *See e.g.*, Human Rights Comm., 84th Sess., *Concluding Observations of the Human Rights Comm.: Syrian Arab Republic*, ¶ 5, U.N. Doc. CCPR/CO/84/SYR

Salvador, the Committee expressed its concern that police recruitment procedures do not bar those “who might have committed violations of human rights or humanitarian law.”¹⁶¹ Such references further reflect the Committee’s understanding that the rights protected by the Civil and Political Covenant are closely linked to the protections of international humanitarian law.

On two occasions, the Committee has invoked the Geneva Conventions.¹⁶² The Committee stated that the *Hamdan v. Rumsfeld*¹⁶³ decision “establishing the applicability of Common Article 3 of the Geneva Conventions,” reflected “fundamental rights guaranteed by the Covenant in any armed conflict.”¹⁶⁴ The Committee subsequently noted that the protections of a regularly constituted court offered by the decision remain to be implemented, pursuant to Article 14 of the Covenant.¹⁶⁵ In other words, while the Committee did not explicitly tie Common Article 3 to articles of the Civil and Political Covenant, it expressed its position that the Civil and Political Covenant protects all Common Article 3 protections. The Committee’s relation of the fair trial protection of Common Article 3 to the similar protection of Article 14 of the Covenant implies that the various protections of Common

(Aug. 9, 2005) (welcoming “the establishment of the National Committee for International Humanitarian Law”); Human Rights Comm., 80th Sess., *Concluding Observations of the Human Rights Comm.: Colombia*, ¶ 4, U.N. Doc. CCPR/CO/80/COL (May 26, 2004) (noting the establishment of a human rights and international humanitarian law unit in the Ministry of External Relations); Human Rights Comm., 61st Sess., *Concluding Observations of the Human Rights Comm.: Senegal*, ¶ 6, U.N. Doc. CCPR/C/79/Add.82 (Nov. 19, 1997) (noting the establishment of domestic mechanisms relating to international humanitarian law).

¹⁶¹ Human Rights Comm., 78th Sess., *Concluding Observations of the Human Rights Comm.: El Salvador*, ¶ 11, U.N. Doc. CCPR/CO/78/SLV (Aug. 22, 2003).

¹⁶² In one other instance, the Committee mentioned the Geneva Conventions, but only to commend Colombia for ratifying the Additional Protocol II to the Geneva Conventions. See Human Rights Comm., *Concluding Observations of the Human Rights Comm.: Colombia*, ¶ 5, U.N. Doc. CCPR/C/79/Add.76 (May 3, 1997) (“The Committee welcomes the recent establishment of an office of the High Commissioner/Centre for Human Rights in Colombia, as well as the ratification by Colombia of the Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts.”).

¹⁶³ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁶⁴ Human Rights Comm., 87th Sess., *Concluding Observations of the Human Rights Comm.: United States of America*, *supra* note 158, ¶ 5.

¹⁶⁵ See *id.* ¶ 20 (noting that the *Hamdan v. Rumsfeld* decision has not yet been implemented).

Article 3 could be similarly placed within relevant Covenant protections. In an early Concluding Observation, the HRC encouraged Croatia to hold prisoners “in accordance with the Geneva Conventions and the Covenant,”¹⁶⁶ but did not specifically link the two treaties.

Beyond tying provisions of the Civil and Political Covenant to international humanitarian law, the Committee has emphasized that states must investigate and prosecute persons accused of having committed serious violations of international humanitarian law, crimes against humanity, or war crimes.¹⁶⁷ The Committee frames this duty under Articles 2, 6, and 7 of the Covenant.¹⁶⁸ Like

¹⁶⁶ Human Rights Comm., 46th Sess., *Comments of the Human Rights Comm.: Croatia*, ¶ 9, U.N. Doc. CCPR/C/79/Add.15 (Dec. 28, 1992).

¹⁶⁷ See Human Rights Comm., 94th Sess., *Concluding Observations of the Human Rights Comm.: Spain*, ¶ 9, U.N. Doc. CCPR/C/ESP/CO/5 (Jan. 5, 2009) (suggesting that State parties take steps to ensure the “non-applicability of a statute of limitations” on crimes against humanity, and reduce judicial and administrative burdens for victims’ families); Human Rights Comm., 92d Sess., *Concluding Observations of the Human Rights Comm.: The Former Yugoslav Republic of Macedonia*, ¶ 12, U.N. Doc. CCPR/C/MKD/CO92 (Apr. 17, 2008) (emphasizing the law of Amnesty does not apply to persons accused of committing serious violations of international humanitarian law); Human Rights Comm., 87th Sess., *Concluding Observations of the Human Rights Comm.: Kosovo (Serbia)*, ¶ 12, U.N. Doc. CCPR/C/UNK/CO/1 (Aug. 14, 2006) (emphasizing that states must investigate “all outstanding cases of war crimes, crimes against humanity and ethnically motivated crimes committed before and after 1999. . . .”); *Concluding Observations of the Human Rights Comm.: Serbia and Montenegro*, supra note 149, ¶¶ 11- 12 (suggesting that the State party should cooperate with the ICTV in the prosecution and apprehension of those accused of committing violations of international humanitarian law); *Concluding Observations of the Human Rights Comm.: Colombia*, supra note 160, ¶ 8 (“[T]he State party should ensure that the proposed legislation on the alternative penalties to imprisonment does not grant impunity to persons who have committed war crimes or crimes against humanity.”); *Concluding Observations of the Human Rights Comm.: El Salvador*, supra note 161, ¶ 11 (asserting that the State party should take steps to ensure that no one in the National Civil Police has committed violations of human rights law); Human Rights Comm., 71st Sess., *Concluding Observations of the Human Rights Comm.: Croatia*, ¶ 11, U.N. Doc. CCPR/CO/71/HRV (Apr. 30, 2001) (calling upon the State party to ensure that the Amnesty law is not applied to grant impunity to accused human rights violators); Human Rights Comm., *Concluding observations of the Comm. on the Rights of the Child: Cambodia*, ¶ 6, U.N. Doc. CCPR/C/79/Add.108 (July 27, 1999) (emphasizing that the State party must bring Khmer Rouge leaders to trial promptly).

¹⁶⁸ See, e.g., *Concluding Observations of the Human Rights Comm.: Serbia and Montenegro*, supra note 149, ¶¶ 11-12 (expressing concerns related to Articles 2, 6, and 7 and recommending that “The State party should take all necessary measures to ensure that those responsible for war crimes and crimes against humanity are brought to justice, to ensure that justice is carried out in a fair manner and to establish an adequate system for witness protection.”); *Concluding*

its review of derogations, however, the HRC's remarks in this regard are largely conclusory and provide little actual analysis of humanitarian law.

The Committee, moreover, has long recognized terrorism as an obstacle to the application of Covenant rights¹⁶⁹ and has expressed increasing concern about anti-terrorism measures in the wake of the attacks on September 11, 2001.¹⁷⁰ Though it does not explicitly delineate the relationship between the "war on terror" and the applicability of humanitarian law, the HRC's discussion of the Covenant in this context is illuminating in view of the numerous linkages it perceives between the two bodies of law, particularly Common Article 3's reflection of "fundamental rights guaranteed by the Covenant in any armed conflict."¹⁷¹

Observations of the Human Rights Comm.: Croatia, supra note 167, ¶ 10 ("[T]he Committee remains deeply concerned that many cases involving violations of articles 6 and 7 of the Covenant committed during the armed conflict . . . have not yet been adequately investigated . . .").

¹⁶⁹ See Human Rights Comm., *Concluding Observations of the Human Rights Comm.: Peru*, ¶ 8, U.N. Doc. CCPR/C/79/Add.8 (Sept. 25, 1992) (condemning "terrorist violence, which shows no consideration for the most basic human rights"); Human Rights Comm., 57th Sess., *Preliminary Observations of the Human Rights Comm.: Peru*, ¶ 3, U.N. Doc. CCPR/C/79/Add.67 (July 25, 1996) ("[M]any of the measures adopted by the Government [to combat terrorism] have frustrated implementation of the rights protected under the Covenant."); Human Rights Comm., 56th Sess., *Concluding Observations of the Human Rights Comm.: Spain*, ¶ 3, U.N. Doc. CCPR/C/79/Add.61 (Apr. 3, 1996) (noting that terrorist attacks "affect the application of the Covenant in Spain").

¹⁷⁰ Anti-terrorism legislation is often linked to States' obligations under Security Council Resolution 1373, which called upon States to "[t]ake the necessary steps to prevent the commission of terrorist acts. . . ." S.C. Res. 1373, ¶ 2(b), U.N. Doc. S/RES/1373 (Sept. 28, 2001). See Human Rights Comm., 75th Sess., *Concluding Observations of the Human Rights Comm.: New Zealand*, ¶ 11, U.N. Doc. CCPR/CO/75/NZL (Aug. 7, 2002) (recognizing that "security requirements relating to the events of 11 September 2001" have rightly given rise to anti-terrorism measures, but expressing concern about "possible negative effects of the new legislation and practices on asylum-seekers"); Human Rights Comm., 75th Sess., *Concluding Observations of the Human Rights Comm.: Yemen*, ¶ 18, U.N. Doc. CCPR/CO/75/YEM (July 26, 2002) ("While it understands the security requirements connected with the events of 11 September 2001, the Committee expresses its concern about the effects of this campaign on the human rights situation in Yemen. . . ."); Human Rights Comm., 74th Sess., *Concluding Observations of the Human Rights Comm.: Sweden*, ¶ 12, U.N. Doc. CCPR/CO/74/SWE (Apr. 24, 2002) (expressing concern about the effect of the "international campaign against terrorism," linked to the attacks of September 11, 2001, on the human rights situation in Sweden).

¹⁷¹ *Concluding Observations of the Human Rights Comm.: United States of America, supra* note 158, ¶ 5.

The Committee's silence as to the link between humanitarian law and the war on terrorism is perhaps unsurprising given the complexity of assessing which provisions of humanitarian law, if any, apply to a war characterized by attacks from globalized non-state actors.¹⁷² International terrorism thus challenges the traditional international/non-international bifurcation of armed conflict that provides the point of departure for determining which humanitarian law principles apply.¹⁷³ Humanitarian law may not apply *at all*, moreover, if the war on terror is conceptualized solely in terms of law enforcement, i.e., in the absence of "armed conflict," in which case human rights law would provide the governing framework.¹⁷⁴ The choice, however, is not so stark. That the war on terrorism can be situated in both law enforcement

¹⁷² The threshold question is whether military action from such actors can amount to an "armed attack," triggering the right of self-defense, and, with "armed conflict," the applicability of humanitarian law. Compare LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 54-55 (2d. ed. 2000) (noting the traditional view that international law regulates only states and that for an armed conflict to warrant regulation conflict to "warrant regulation by the international law of armed conflict was necessary for the situation to amount to . . . a contention between states . . .") with Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L. J. 41, 47-51 (2002) (arguing that the 9/11 attacks constituted an "armed attack" and stating that the "U.S. interpretation of the incidents as an armed attack was largely accepted by other nations") and RICHARD FALK, *THE GREAT TERROR WAR* 102 (2003) (stating with regard to the tremendous damage inflicted by the 9/11 attacks that, "stretching the international law doctrine of self-defense to include a non-state actor seemed reasonable and necessary").

¹⁷³ If the war on terror constitutes an "international armed conflict," the four Geneva Conventions, Geneva Protocol I, and other humanitarian law principles apply. "Armed conflicts not of an international character" are subject to a different subset of humanitarian law principles: either the broadly applicable Common Article 3 or Additional Protocol II, which defines non-international armed conflicts more narrowly. See, e.g., Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 33-41 (2003) (arguing that September 11 triggered an "armed conflict not of an international character" and hence Common Article 3 is applicable).

¹⁷⁴ See Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 3-6 (2004) (discussing the limited impact of humanitarian law on situations that "do not reach a level above 'internal, disturbances and tensions. . . .'"). Of course, the broad proposition that humanitarian law does not apply to the war on terror was rejected by the Supreme Court in *Hamdan v. Rumsfeld*, which held that Common Article 3 "affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a non-signatory 'Power' who are involved in a conflict 'in the territory of' a signatory." 548 U.S. 557, 630 (2006).

and international armed conflict paradigms¹⁷⁵ highlights the need for authoritative interpretations of humanitarian law in this context.

The Committee has expressed a variety of concerns about the impact on Covenant rights of states' responses to terrorism. Anti-terrorism legislation may be overbroad or vague, leading to indiscriminate enforcement threatening Covenant rights.¹⁷⁶ Such laws may directly conflict with the Covenant and in some cases amount to an impermissible derogation of Covenant rights.¹⁷⁷ Alleged terrorists may be subjected to arbitrary detention, ill-treatment, or torture.¹⁷⁸ Anti-terrorism laws may also raise issues

¹⁷⁵ See Watkin, *supra* note 174, at 6 (“[T]he challenge of international terrorism does not need to be dealt with exclusively under either criminal law or the law of armed conflict.”); Murphy, *supra* note 172, at 49 (“[T]here is no need to view the September 11 incidents as presenting a binary choice between being regarded either as a criminal act or as a use of force amounting to an armed attack. In fact, the incidents can properly be characterized as *both* a criminal act and an armed attack.”).

¹⁷⁶ E.g., *Concluding Observations of the Human Rights Comm.: Spain*, *supra* note 167, ¶ 10 (noting “potentially too broad scope of the definitions of terrorism in domestic law” which “could lead to violations of several of the rights enshrined in the Covenant”); Human Rights Comm., 86th Sess., *Concluding Observations of the Human Rights Comm.: Norway*, ¶ 9, U.N. Doc. CCPR/C/NOR/CO/5 (Apr. 25, 2006) (expressing concern about the “potentially overbroad reach of the definition of terrorism” and stating that Norway “should ensure that its legislation adopted in the context of the fight against terrorism . . . is limited to the crimes that deserve to attract the grave consequences associated with terrorism”); Human Rights Comm., 83d Sess., *Concluding Observations of the Human Rights Comm.: Mauritius*, ¶ 12, U.N. Doc. CCPR/CO/83/MUS (Apr. 27, 2005) (criticizing domestic terrorism legislation “as the notion of terrorism is vague and lends itself to broad interpretations”); Human Rights Comm., 82d Sess., *Concluding Observations of the Human Rights Comm.: Morocco*, ¶ 20, U.N. Doc. CCPR/CO/82/MAR (Dec. 1, 2004) (expressing concern about the broad definition of “terrorist act” and recommending that State party “ensure compliance with the provisions of article 15 and all the other provisions of the Covenant”).

¹⁷⁷ See Human Rights Comm., 95th Sess., *Concluding Observations of the Human Rights Comm.: Australia*, ¶ 11, U.N. Doc. CCPR/C/AUS/CO/5 (May 7, 2009) (noting that some provisions of domestic anti-terrorism legislation “appear to be incompatible with the Covenant rights, including with nonderogable provisions”); Human Rights Comm., 73d Sess., *Concluding Observations of the Human Rights Comm.: United Kingdom*, ¶ 6, U.N. Doc. CCPR/CO/73/UK (Dec. 6, 2001) (noting that adoption of legislative measures to combat terrorism “may require derogations from human rights obligations” and urging that any such measures be “in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in article 4 of the Covenant”).

¹⁷⁸ See *Concluding Observations of the Human Rights Comm.: Yemen*, *supra* note 129, ¶ 13 (“The Committee remains concerned . . . about reported grave violations

of impunity where law enforcement officials are exempted from liability for acts stemming from counter-terrorist operations.¹⁷⁹ After the events of September 11, 2001, the crux of the Committee's most frequently elucidated concern to ensure that "the fear of terrorism . . . [does] not become a source of abuse."¹⁸⁰

Accordingly, the "war on terrorism" presents an array of problems as to which the Committee recognizes humanitarian law is applicable. The Concluding Observations, however, do not explicitly refer to humanitarian law in seeking to address these problems. Rather, the Committee frames its concern about terrorism-inspired abuse entirely in terms of the Civil and Political Covenant.

3.3. Summary

The Committee uses its Concluding Observations to take a broader view of the human rights situation in the State party. Taking into account the relationship between the Covenant and other human rights instruments, the HRC often relies on these instruments in making recommendations and drawing conclusions as to the human rights situation in the State party. This approach has led the HRC to link protections of the Civil and Political Covenant explicitly to those offered by international humanitarian law. The Committee has further emphasized that a state may only derogate from those protections in accordance with Article 4 and its General Comment 29. A state may be held responsible for violations committed by its agents on foreign soil and a state also has the responsibility to investigate and prosecute individuals accused of committing crimes against humanity, war crimes, or other serious human rights abuses.

While the Concluding Observations offer the Committee's most explicit and substantial treatment of international humanitarian

of articles 6, 7, 9 and 14 of the Covenant committed in the name of the anti-terrorism campaign."); *Concluding Observations of the Human Rights Comm.: Spain*, *supra* note 169, ¶ 10 (expressing concern at "numerous reports . . . of ill-treatment and even torture inflicted on persons suspected of acts of terrorism by members of the security forces").

¹⁷⁹ See *Concluding Observations of the Human Rights Comm.: Russian Federation*, *supra* note 170, ¶ 13 (expressing concern over legislation exempting law enforcement and military personnel from liability for violations committed during counter-terrorist efforts, citing Articles 2, 6, 7, and 9).

¹⁸⁰ Human Rights Comm., 75th Sess., *Concluding Observations of the Human Rights Comm.: Yemen*, ¶ 18, U.N. Doc. CCPR/CO/75/YEM (July 26, 2002).

law, they do not provide the robust analysis necessary for a precedential interpretation. The same approach that compels the Committee to consider humanitarian law has also hindered it in providing such an analysis: humanitarian law is explored only to the limited extent necessary to contextualize the Covenant rights at issue. In short, the Committee links humanitarian law to provisions of the Covenant but provides virtually no substantive analysis of humanitarian law itself.

The “war on terror” likewise presents a host of issues, including wartime detention, to which the HRC recognizes international humanitarian law may apply. The Committee’s recognition of an expanding propensity for abuse in the wake of the September 11 attacks highlights the need to explore humanitarian law’s potential to address these issues. The Committee, however, does not even invoke humanitarian law in this context, relying instead on the provisions of the Covenant.

4. DECISIONS AND VIEWS

The HRC performs three separate functions that result in written interpretations: its Decisions and Views taken pursuant to individual complaints received under the Optional Protocol, its General Comments elaborating Covenant protections, and its Concluding Observations issued in response to periodic country reports by member states. The Committee does not perform these three functions in isolation: in its Decisions and Views it frequently references its General Comments, in its General Comments it summarizes its experience in making Concluding Observations, and in its Concluding Observations it occasionally references its General Comments and its Decisions and Views.

Nonetheless, the Committee varies distinctly among its three functions regarding the method of analysis employed and the utilization of other international instruments. In its Decisions and Views, the Committee avoids referencing other international instruments, although in recent sessions it has utilized them slightly more as support for its findings. The Committee has been presented with little opportunity to consider international humanitarian law, as most individual communications have not supported their claims with the rules of international humanitarian law. The Committee’s analysis, therefore, largely relies on considering its own jurisprudence and only in very rare situations

has the Committee explicitly considered other international instruments as relevant.

In its General Comments, the Committee explicitly acknowledges other international obligations and takes care to determine that Covenant protections comply. The General Comments, however, tend to provide conclusory statements of broad policy rather than fact-based analysis. The Committee frequently cites to its jurisprudence under its Decisions and Views to support its statements.

In the Concluding Observations, the Committee takes a broader view of a state's obligations and places Covenant protections within the general framework of human rights protections. The Concluding Observations do not provide much in the way of analysis; instead, they offer broad statements that generally frame a state's obligations.

From a conceptual standpoint, the HRC is essentially performing all the analysis needed to provide authoritative interpretations of international humanitarian law. First, under its Concluding Observations, it links international humanitarian protections to Covenant protections. Second, the General Comments further explain the nature of the protections offered by the Civil and Political Covenant. Third, the case-by-case analysis of individual complaints, based frequently on the General Comments, demonstrates when a state violates its obligations under the Covenant on a specific, fact-based level. Logically, if an individual complaint arises from a situation of armed conflict, the Committee may be considering the rules of international humanitarian law through the Covenant.

The problem, however, is that the Committee will only implicitly consider international humanitarian law. One would still need to work backward from a Decision and View to determine whether the Committee's finding actually dealt with international humanitarian law. For example, if the Committee found a violation of Article 7 of the Covenant, it would base that decision on its jurisprudence and perhaps a General Comment. Even though the Committee has stated that a violation of Article 7 may entail a violation of international humanitarian law,¹⁸¹ there would be no practical way to determine whether the Covenant

¹⁸¹ See *Concluding Observations of the Human Rights Comm.: Central African Republic*, *supra* note 129, ¶ 8 (observing that no investigation of violations of Article 7 had yet been carried out in the Central African Republic).

violation also constituted a violation of international humanitarian law because the Committee would only explicitly find a violation of the Covenant.

The result is that despite the amount of analysis the HRC performs, it does not create effective precedent beyond the Civil and Political Covenant. Although the Committee may deal with violations of international humanitarian law, its conclusions—whether through the Decisions and Views, the General Comments, or the Concluding Observations—are inevitably framed through the Covenant.

5. RECOMMENDATIONS

The situation is as follows: the HRC can competently analyze human rights violations occurring in situations of armed conflict. Its resulting interpretations, however, are framed through the Civil and Political Covenant, not through the rules of international humanitarian law. To provide a precedential interpretation of international humanitarian law, there are two basic options: either the HRC can broaden its scope to include analysis of international humanitarian protections when it speaks to issues occurring in the context of armed conflict or a separate body can be created to address alleged violations of international humanitarian law. The best approach would be for the HRC to consider relevant international instruments explicitly in its analysis, while limiting itself to finding violations of the Civil and Political Covenant.

Creating a separate body to address alleged violations of international humanitarian law presents a host of practical problems, ranging from designing a new international body to gaining international acceptance.¹⁸² Even if such a body were successfully created, there would likely be a large amount of substantive overlap between it and already existing institutions like the HRC and the International Criminal Court. Depending

¹⁸² Perhaps the most obvious obstacle to the creation of a separate body is the likely paucity of political will. See, e.g., Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM J. INT'L L. 259, 282 (1992) (noting "a broad consensus among governments that the creation of new institutions should be avoided when possible"). Great power antinomy may further undermine the efficacy of such a body. See, e.g., Salvatore Zappalà, *The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements*, 1 J. INT'L CRIM. JUST. 114, 133 (2003) (arguing that Article 98 agreements as proposed by the United States are incompatible with the Rome Statute).

upon the composition of the body, moreover, it may take substantial time to develop expertise.¹⁸³ Nonetheless, an international body designed to consider violations of international humanitarian law would provide explicit analysis and precedent and could be comprised of members with the appropriate expertise. Ultimately, however, such an approach would be complicated to achieve and likely redundant in its final product. Creating a new international body, therefore, does not present the most feasible or effective way to address interpretations of international humanitarian law.

The alternative is to require the HRC to modify its approach when addressing issues of international humanitarian law. The basic output required would be for the Committee to state when an issue presents a violation of the Geneva Conventions. There are several arguments in favor of and in opposition to such an approach.

A simple argument in favor of having the Committee explicitly consider international humanitarian law is that it already does so. According to its Concluding Observations, the Covenant already offers many of the same protections as the Geneva Conventions and international humanitarian law. Consequently, in its Decisions and Views, the Committee would only need to take a few sentences to relate violations of the Covenant explicitly to international humanitarian law, which it already does in its Concluding Observations. Moreover, since such violations only occur in situations of armed conflict, the Committee would only have to perform the additional analysis in the uncommon situation of a state of emergency or armed conflict. Additionally, authors and State parties have appeared eager to support their positions by reference to international instruments, which they would likely put before the Committee. Similarly, the Committee considers itself

¹⁸³ A potent criticism of the application of humanitarian law by human rights bodies is that such bodies often lack expertise in the law of war. The HRC, however, contains a greater percentage of members with expertise in humanitarian law than do other human rights bodies. Compare Meron, *supra* note 117, at 247 (citing the lack of expertise in “the law of war” and the tendency of such bodies to “reach conclusions that humanitarian law experts find problematic”), with Christine Byron, *A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, 47 VA. J. INT’L L. 839, 882 (2007) (noting that fifty percent of the HRC’s experts have some expertise in humanitarian law, as compared to between fourteen and twenty-eight percent and sixteen percent of the Inter-American Court and Commission of Human Rights and the European Court of Human Rights, respectively).

competent to consider other instruments and, on several occasions, explicitly has incorporated other standards to support a finding of a violation. By finding a violation of the Civil and Political Covenant through a violation of another international standard, the Committee is effectively finding a violation of the other international instrument.

The immediate counter-argument to having the Committee explicitly find violations of international humanitarian law in its Decisions and Views is that the Optional Protocol to the Civil and Political Covenant limits the Committee to considering violations of the Civil and Political Covenant. Therefore, the Committee has no mandate or authority to pronounce state violations of international humanitarian law. Another counter-argument is that there is no need for the Committee to address international humanitarian law explicitly: since the Committee has declared that the Covenant protects many of the same rights as international humanitarian law and applies regardless of the situation, the Committee already addresses any potential violation of international humanitarian law through the Civil and Political Covenant. A further argument is that the Committee already has built up its own jurisprudence based on the Civil and Political Covenant, and that suddenly changing its methodology and approach could call into question the viability of its previous jurisprudence. There is also the limitation that only individuals subject to the jurisdiction of states party to the Optional Protocol could raise such claims, so the Committee would be effectively precluded from considering alleged violations of international humanitarian law occurring in nonparty states. This problem, however, is no different from what would occur with attempting to create a separate body to consider violations of international humanitarian law.

Reducing the arguments for and against, the Committee would not have to perform substantially more work or analysis to address international humanitarian law in its Decisions and Views, but under the Optional Protocol cannot pronounce a violation of another international instrument.

The best the HRC could do under its current mandate would be to utilize relevant international instruments explicitly in its analysis of alleged Covenant violations. By incorporating other international instruments into its analysis, the Committee could still comply with the Optional Protocol so long as the individual claimed a violation of a Covenant right. Because the Civil and

Political Covenant ostensibly offers many of the same protections as international humanitarian law, an individual could allege a violation of the Covenant and cite the Geneva Conventions in support. The Committee could still find a violation of only the Covenant, but if it explicitly incorporated the Geneva Conventions into its analysis, it might actually create some precedent for international humanitarian law and interpretation of the Geneva Conventions.

Such an approach would encourage individuals to support their claims with relevant international humanitarian standards, enable the HRC to provide analysis of those standards, and take a needed further step toward harmonizing the substance of human rights and humanitarian law. Even though the ultimate findings would be in terms of Covenant provisions, the Committee's analysis could be informative and precedential.