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Impact of Human Rights Law

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The question of whether human rights law impacts upon the regulation of armed conflict became a vital issue to address following the adoption of the Charter of the United Nations in 1945. The Charter identified human rights as one of the four founding purposes of the United Nations¹ and included provisions upon which a universal system for the protection of human rights could be built.² The Charter thereby affirmed that human rights were no longer part of the exclusive jurisdiction of each member of the United Nations but a subject of international concern and a branch of public international law.

The establishment of human rights law as an international legal framework raised the question of its application during armed conflict and its relation to the law of armed conflict. At first, strict separation and compartmentalisation of the law of armed conflict [LOAC] and international human rights law [IHRL] was advocated. For instance, the late Professor Colonel Draper, leading scholar and LOAC expert writing on the relationship between human rights and LOAC noted that '[t]he attempt to confuse the two regimes of law is unsupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametrically opposed.'³ The reasons for advocating such separation were rooted at many different levels. Notably, the two fields became part of public international law at different times, initially developed independently of one another and were seemingly divergent in their objectives, scope of application, norms, implementing mechanisms and the environments in which they apply.⁴ These arguments were used to sustain that human rights and LOAC are two distinct branches of international law that should be kept apart in two tight compartments and not interact.⁵

¹ UN Charter art 1(3).

² *ibid* art 55(c). For more details on this provision see Charter see B Simma and others (eds), *The Charter of the United Nations: A Commentary* (2nd edn OUP 2002) vol II, 917-940.

³ G I A D Draper, 'Humanitarian Law and Human Rights' (1979) *Acta Juridica* 199, reprinted in MA Meyer and H McCoubrey (eds), *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the Late Professor Colonel G. I. A. D. Draper, OBE* (Kluwer, The Hague 1998) 149.

⁴ See generally on the early development of international humanitarian law and international human rights law Jean Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff 1985) 5-25; David Levinson (ed), *The Wilson Chronology of Human Rights* (H.W. Wilson 2003) 1-19; Paul Gordon Lauren, *The Evolution of International Human Rights* (2nd edn, University of Pennsylvania Press 2003) 1-36; Rene van der Wolf and Willem-Jan van der Wolf (eds), *Laws of War and International Law* (Wolf 2002) vol 1, 9-18.

⁵ See Michel-Cyr Djiena Wembou and Daouda Fall, *Le Droit International Humanitaire: Théories et Réalités Africaines* (L'Harmattan 2000) 66-67; Hector Gros Espiell, 'Human Rights: Concept and Standards' in Janusz Symonides (ed), *Humanitarian Law and Human Rights* (Ashgate 2000) 345, 352; Raúl Emilio Vinuesa, 'Interface, Correspondence and Convergence of Human Rights and International

Over time, and especially from the 1960s and holding of the Teheran Conference,⁶ the separatist approach to international human rights law and LOAC was rejected; it appeared no longer desirable or feasible to consider the legal frameworks as completely foreign to one another. The Tehran Conference discussed at length the application of human rights in times of armed conflict and became a decisive event for the relationship between international human rights law and LOAC. In its proclamation it linked the existence of armed conflicts with human rights violations, highlighted the impact of conflicts on human rights and called upon the international community to react to those situations. At the institutional level during these times, the United Nations and the International Committee of the Red Cross started to show interest in exploring and developing the interplay between the two legal frameworks.

While marked differences exist in the scope of application of international human rights law and LOAC, it remains that the disciplines are both applicable in situations of armed conflict. As international humanitarian and human rights norms and bodies developed, and the occurrence of non-international armed conflict increased, the impact of each field on the other became clearer. Their relationship and need for linking them has been acknowledged for decades now. Most experts agree that the disciplines cannot be totally dissociated from one another and there is a desire to see productive interaction between the two fields of international law.

The interaction between international human rights law and LOAC has great practical importance both at the protection and the implementation levels. For example, the applicability of human rights law might affect how and when armed forces resort to lethal force in specific circumstances. Likewise, how the interplay between the disciplines is construed can affect the legal protection and guarantees given to individuals detained during a conflict. The interpretation of the interplay between the disciplines can further determine whether a given State will or will not be found responsible for human rights violations occurring in the context of fighting and on the means of redress that will be available to alleged victims.

The existence of these two potentially applicable legal frameworks in situation of armed conflict creates concurrent and sometimes competing protections and obligations. Legal uncertainties in such contexts rarely ensure protection of individuals and can lead to interpretation of the law that risks being impractical on the ground. The discussion has now moved beyond whether human rights law impact upon the law of armed conflict, or if the two disciplines interact. The existence of a relationship between international human rights law and LOAC is now widely accepted. Their concurrent application is at present more or less a *fait accompli* but there remain debates on the nature of their interaction.

This chapter examines four central issues that need to be addressed to assess the impact of human rights law on the law of armed conflict and *vice versa*. It discusses the applicability and extraterritorial applicability of human rights law during armed conflict. It highlights certain areas where human rights law and the law of armed conflict can influence each other. It examines how the interplay between the disciplines has been articulated, and provides

Humanitarian Law' (1998) 1 *YBIHL* 70; Dietrich Schindler, 'The International Committee of the Red Cross and Human Rights' (1979) 208 *IRRC* 3; Draper (n 3) 145.

⁶ 'Proclamation of Tehran', Final Act, International Conference on Human Rights, Tehran, 22 April-13 May 1968, UN Doc A/CONF. 32/41 (1968), preamble.

suggestions on how to move forward to clarify the interplay and develop tools to better articulate the interaction between the disciplines.

1 Continued Applicability during Armed Conflict and Extraterritorial Applicability of Human Rights Law

The debate over the applicability of international human rights law during armed conflict often conflates two issues that require separate attention: that of continued applicability of human rights law once the applicability of LOAC has been triggered by an armed conflict; and the separate matter of whether human rights obligations can apply to extraterritorial conduct. The distinction between these issues is apparent when considering the fact that the continued applicability concern will arise in non-international armed conflicts of a type that occur within the territory of the state, thus requiring an answer only to the first question. Likewise, concerns over the applicability of human rights obligations extraterritorially is a matter that is not confined to wartime, and can arise outside situations of armed conflict.

The fact that international human rights law remains applicable even after an armed conflict has triggered the applicability of LOAC, is now firmly established and cannot be reasonably contested. It has been affirmed repeatedly and in no uncertain terms by the International Court of Justice (ICJ) in a combination of case law and advisory opinions.⁷ The treaty sources themselves also demonstrate that human rights do not dissipate into thin air once a conflict breaks out. Recalling that at the heart of the concept of human rights is the preservation of human dignity and protection from abuse of power, it is no surprise that human rights remain of utmost concern during times of war. Notably, when human rights treaties mention states of emergency, including war, they allow for certain limitations on rights through the derogation mechanism, but keep a significant portion of human rights obligations as binding even in such times, and thus designed to apply in periods of armed conflict.⁸ Indeed, international human rights monitoring bodies have continued to hold states to their human rights obligations in cases covering circumstances in which LOAC was also applicable.⁹ The continued applicability of human rights law is therefore grounded in its legal origin, and confirmed by international bodies. But one should not confuse *whether it applies*, with the question of *how it is implemented*. In other words, criticism of applying human rights obligations to circumstances of armed conflict are misplaced if they challenge the very applicability of international human rights law, but this does not relieve the need to further examine the precise modalities of application. Derogation from certain aspects of specific obligations, as mentioned above, is perhaps the most obvious manner in which the actual application of human rights might differ during a conflict. The question of how human rights obligations – while remaining applicable –

⁷ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, para 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para 216.

⁸ ICCPR art 4, ECHR art 15, IACHR art 27.

⁹ *Abella v Argentina* (Case no 11.137, Report no 55/97, IACmHR, 18 November 1997); HRC, ‘General Comment 29: States of Emergency (Article 4)’, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) para. 3; CESCR, ‘Concluding Observation: Israel’, UN Doc E/C.12/1/Add.69 (31 August 2001); *Al-Skeini and Others v UK* (Application no 55721/07, ECtHR GC, 7 July 2011).

might be interpreted and applied in a contextual approach that takes the armed conflict into account, will be returned to in greater detail in a later section.

With the general question of continued applicability answered, the separate matter of extraterritorial applicability must now be examined. When faced with an internal armed conflict, as are a weighty proportion of all armed conflicts in recent decades, the applicability of international human rights law cannot be questioned on these grounds. The picture, however, changes once we examine the conduct of states occurring beyond their borders. As a side note, it should be mentioned that in most cases this will arise in the context of international armed conflicts, but the question is equally relevant to non-international armed conflicts which include extraterritorial elements (e.g. cross-border operations against members of armed groups).¹⁰ In addition, it must be stressed that this is a question that requires settling within the realm of analysis of human rights law itself, and is separate from the question of interplay with LOAC. This is because extraterritorial applicability of human rights obligations is an issue that covers a wider scope than conflict operations.¹¹ It must therefore be addressed independently; if it transpires that human rights obligations do apply to extraterritorial conduct, we then must return to the separate existing question of the interplay between the two bodies of law and how the obligations must be interpreted in practice.

Two primary challenges present themselves as potential obstacles to extraterritorial human rights obligations: a legal and textual argument attempting to demonstrate that the international human rights treaties were designed to only apply within a state's borders; and a claim that any expectation of extraterritorial obligations fails the test of practicability and cannot be realistically managed when it comes to implementation.¹² The treaty based arguments rest on the fact that human rights treaties tend to speak of obligations owed to individuals subject to the jurisdiction of the state, thus seemingly excluding individuals outside its territory.¹³ Moreover, the ICCPR goes further than just mentioning jurisdiction, and speaks specifically of individuals 'within its territory and subject to its jurisdiction'.¹⁴ Nevertheless, as strong as these arguments might seem at first glance, a detailed examination demonstrates that they do not prevent the applicability of extraterritorial human rights obligations.

First, as to the ICCPR, an examination of the drafting process reveals that the inclusion of the reference to territory was designed to prevent the possibility that an individual living abroad would be able to bring a human rights claim against their state of nationality in a matter over

¹⁰ There are many examples in which States take cross-border military action against armed groups, including: Israel v. Hezbollah in Lebanon, Turkey v. PKK in Iraq, US v. Al-Qaida in Afghanistan, Colombia v. FARC in Ecuador, and a host of cross border operations by DRC's neighbours into its territory. For an analysis of how to classify such situations, see Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012).

¹¹ For an analysis of extraterritorial human rights obligations, see Noam Lubell, *Extraterritorial Use of Force Against Non-state Actors* (OUP 2010) ch 8; see also Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

¹² Michael J Dennis, 'Non-Application of Civil and Political Rights Extraterritorially During Times of International Armed Conflict' (2007) 40 *Israel LR* 453.

¹³ ECHR art 1; IACHR art 1; ICCPR art 2.

¹⁴ *ibid.*

which it had no control.¹⁵ This has a clear logic when applied to such circumstances. The same logic is, however, completely misplaced when applied to circumstances in which it is the state itself which crosses borders and takes direct action which impinges upon an individual's rights. The drafting process therefore reveals that the reference to territory was not intended to exclude the latter circumstances. As for the reference to jurisdiction, the analysis is more complex, but ultimately arrives at a similar conclusion.¹⁶ Interpretations of jurisdiction generally tend to point to the authority of a state to take a certain action such as legislating or enforcing legislation.¹⁷ Perceived in this manner, being within the jurisdiction of a state would mean being in a situation in which the state has the authority to pass laws or enforce the law in a way that impacts upon the individual. But this notion of jurisdiction fails to meet the objective of protection that human rights law is destined to provide. Consider its application in circumstances in which State A sends its agents on a covert mission into the territory of State B, to illegally abduct an individual, and that following the abduction, these state agents torture and summarily execute the individual, all while remaining in State B. State A did not have the required jurisdictional authority to engage in such acts. If the human rights obligations were dependant on an interpretation of jurisdictional authority, it would mean that by virtue of acting without authority a state would be exempt from accountability for its action. Illegality of the act would provide the perpetrator with impunity for its consequences. This clearly goes against the very object and purpose of the human rights treaties, and cannot be the correct interpretation. Instead, the notion of jurisdiction in human rights treaties must be understood in the context of their obligations, and indeed has been done so by a number of human rights bodies. The approach of these bodies has been to find that by virtue of the circumstances of the case or the act in question, a state might bring the individual within its jurisdiction for the purposes of human rights obligations.¹⁸

There are a number of circumstances which can be used to demonstrate this approach, many of them particularly pertinent to situations of armed conflict. The first of these is situations of military occupation. In these circumstances, despite acting extraterritorially and not being the sovereign power, the occupying state is considered to be bound by international human rights law in its dealing with the population of the occupied territory.¹⁹ In many ways, this is the

¹⁵ Commission on Human Rights, 'Summary Record of the Hundred and Ninety-Fourth Meeting', UN Doc E/CN.4/SR.194 (1950) paras 15-16.

¹⁶ See analysis in Lubell, *Extraterritorial Use of Force* (n 11) 207-213.

¹⁷ Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (OUP 2003) 268; 'In its broadest sense, the jurisdiction of a State may refer to its lawful power to act and hence to its power to decide whether and, if so, how to act.' Bernard Oxman, 'Jurisdiction of States' in *Encyclopedia of Public International Law* (Elsevier 1997) vol III, 55, 55.

¹⁸ For examples, see *Cyprus v Turkey* (App No 6780/74 and No 6950/75, ECtHR, 26 May 1975) para 8; *X v UK* (App No 7547/76, ECtHR, 15 December 1977); *Alejandro et al v Cuba* ('*Brothers to the Rescue*') (Case no 11.589, Report no 86/99, IACmHR, 29 September 1999) para 23; *Coard et al v US* (Case no 10.951, Report no 109/99, IAmCHR, 29 September 1999) para 37; *Issa and Others v Turkey* (Application no 31821/96, ECtHR, 16 November 2004) para 72.

¹⁹ *Wall* (n 7) paras. 107–112; *DRC v Uganda* (n 7) paras. 216–220; HRC, 'Concluding Observations: Israel', UN Doc CCPR/C/79/Add.93 (18 August 1998); CESCR, 'Concluding Observations: Israel', UN Doc E/C.12/1/Add.69 (31 August 2001); Walter Kälin, 'Report on the Situation of Human Rights in Kuwait under Iraqi Occupation', UN Doc E/CN.4/1992/26 (15 January 1992) paras 55–59; *Loizidou v Turkey* (*Preliminary Objections*) (Application no 15318/89, ECtHR, 23 March 1995) paras 62–64; *Cyprus v Turkey* (Application no 25781/94, ECtHR, 10 May 2001) para 77.

easiest of the examples, since the very fact of being an occupying power means that the state has been found through LOAC to have an element of control and authority, and having displaced the regular authorities it is natural that the rights of the population are found to rest in its hands. This has been affirmed in numerous cases, and is considered to fulfil what is sometimes referred to as the test of control over territory. In such situations the state is considered to be responsible for the whole spectrum of potentially applicable (depending, for example, on the treaties in force) human rights obligations.²⁰

Matters get more complicated absent control over a large territorial area, but human rights obligations can still remain applicable. For example, if a state has control over a detention facility, it will be bound by human rights law in relation to the detainees therein. This too is emerging as relatively hard to argue against.²¹ As a brief reminder, it must be stressed at this stage that one cannot adequately respond to these arguments by asserting that LOAC will have the answer even if human rights law does not apply, since a number of extraterritorial scenarios can and have occurred also in situations outside of armed conflict and in which LOAC is not there to provide an alternative.²² We therefore need an independent answer as to the applicability of human rights law. The interplay with LOAC, if it applies, is a question to be answered at the next stage.

Clarity and agreement begin to fade when we turn to circumstances where there is no control over territory or even a single facility, and in which we speak of control over an individual or aspects of the individual's life. It is however submitted here that both logic and case-law support a limited extension of human rights obligations to such situations. The applicability of human rights obligations in the above mentioned occupation and detention scenarios did not depend on consent of the territorial state, but on the control exerted over the population under the acting state's thumb. What if the detention facility was not a formal prison, but a makeshift detention camp, or simply state agents who are holding abducted individuals in a secret location? As far as the power relationship between the state and the individuals is concerned, the scenario is the same, and human rights obligations must apply.²³ Likewise the same logic is clear even if there is no lengthy detention, but a short operation in which state agents grab hold of an individual and kill him/her.²⁴ Until this point, it is probably not hard to convince that some elements of human rights obligations (e.g. the right to life) should apply. But what if the state agents do not physically grab hold of the individual, and instead shoot him/her from ten feet away? Excluding this from the purview of human rights obligations, would simply create an

²⁰ *Al-Skeini v UK* (n 9) para.138.

²¹ *Hess v UK (Admissibility)* (Application no 6231/73, ECmHR Plenary, 28 May 1975) (1975) 2 D&R 72; *Coard v US* (n 18) para 37; *Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba* (IACHR, 12 March 2002) 41 ILM (2002) 532; *Al-Skeini et al v Secretary of State for Defence* [2004] EWHC 2911, paras 286-288; *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26, para 106; *Al-Saadoon and Mufdhi v UK* (Application no 61498/08, ECtHR, 30 June 2009) paras 86-89.

²² *Hess v UK* (n 21).

²³ *Lopez Burgos v Uruguay* (Communication no 52/1979, HRC, 29 July 1981) UN Doc CCPR/C/OP/1 at 88; *Celiberti de Casariego v Uruguay* (Communication no 56/1979, HRC, 29 July 1981) UN Doc CCPR/C/OP/1 at 92.

²⁴ *Issa and Others v Turkey* (Application no 31821/96, ECtHR, 16 November 2004) paras 71-2.

incentive to shoot and kill, rather than detain.²⁵ This, however, raises the question of how far it can be stretched – should it apply not just to shooting an individual from a few feet away, but also to bombing from a distance, or a targeted missile strike launched from an unmanned aerial vehicle? These are questions that are still the matter of debate.²⁶ The position taken here is that the object and purpose of international human rights law, the majority of case law by human rights bodies, and the logical conclusion of the above arguments, is that human rights law obligations can apply in such circumstances. However, two important caveats must be introduced: first, that unless we are in circumstances in which the state has control and authority over the territory – in which case it is bound by all applicable human rights treaties – then the applicable obligations will only be those which the state has the power to directly control. In other words, when state agents point a sniper rifle at the head of an individual, they certainly have control over the person’s right to life, but one would not expect a claim over the right to trade union membership to be particularly pertinent to the case.²⁷ Second – and vital in the context of the current examination – while the above establishes the applicability of a human rights obligation, it still remains to be determined how this obligation must be interpreted in practice if the situation is one in which LOAC also applies.

To conclude this section, in both the matter of continued applicability of human rights law during conflict, and in the question of extraterritorial applicability of such obligations, it is therefore imperative to understand the difference between the question of whether human rights obligations *can* apply, as opposed to the modality of *how* they might apply. In most cases some form of human rights obligations will be applicable, but the circumstances and context can have profound implications on how these obligations must be implemented in practice. The following sections will demonstrate how the joint applicability of human rights and LOAC impact upon the interpretations of both bodies of law, and suggest possibilities for a practical approach to their implementation.

²⁵ See discussion of killing from a distance in Martin Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’ in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 73, 77-78; ‘Attempts by the respondent governments in *Bankovic* to distinguish *Issa* rested on the at best tenuous argument that the victims were technically in the custody of Turkish forces and therefore within Turkish “jurisdiction” – simply shooting suspects is apparently immune from scrutiny, so long as you are careful not to arrest them first!’ Hurst Hannum, ‘Remarks, Bombing for Peace: Collateral Damage and Human Rights’ (2002) 96 *ASIL Proceedings* 95, 98; Lubell, *Extraterritorial Use of Force* (n 11) 220-227.

²⁶ *Bankovic et al v Belgium et al (Decision on Admissibility)* (Application no 52207/99, ECtHR, 12 December 2001) appeared to negate applicability in circumstances of aerial bombardment, paras 59-60; Human rights obligations were found however in Cuba’s shooting down of a civilian plane outside national airspace, in *Alejandro v Cuba* (n 18) paras 25,53; Moreover, there have been numerous ECHR cases before and after *Bankovic*, that take a wider approach to extraterritorial applicability, including *Issa v Turkey* (n 18); *Isaak and Others v Turkey (Admissibility)* (Application no 44587/98, ECtHR, 28 September 2006); *Ocalan v Turkey* (Application no 46221/99, ECtHR, 12 May 2005) para 91; *Al-Skeini and Others v UK* (n 9).

²⁷ Orna Ben-Naftali and Yuval Shany ‘Living in Denial: The Application of Human Rights in the Occupied Territories’ (2003-2004) 37 *Israel LR* 17, 64; Lubell, *Extraterritorial Use of Force* (n 11) 227-231.

2 Areas of Direct Influence

The cross-over areas between LOAC and international human rights law are endless, and the manifestation of the human rights impact on LOAC takes many forms. This section will illustrate a number of select issues in which the interaction demonstrates the potential for positive engagement between the bodies of law, even if at times challenging. One of the most obvious areas to begin with is the regulation of detention and trial. Both bodies of law have numerous rules in this sphere and the applicability of human rights obligations in relation to detention is amongst the least controversial, as far as the earlier discussion on challenges to applicability. Moreover, human rights law might allow for forms of administrative/security detention as envisaged in LOAC, although derogation may be required.²⁸ A simple reverting to one body of law while disregarding the other does not provide a solution, since neither body has all the answers to all detention issues. For example, LOAC does not contain clear enough guidance for detention during non-international armed conflicts,²⁹ while human rights law does not contain the detailed rules for prisoners of war. The bodies of law must therefore work together, filling in the gaps in each other's arsenal. When LOAC requires a fair trial, for example, it is human rights law which can provide us with an understanding of the elements required to determine whether a specific procedure meets the necessary standard. There are many other such instances, and the ICRC study on customary international law provides an excellent example of the interlacing of human rights and LOAC in regulation of detention and trial.³⁰

Another area where the interaction is clearly necessary, is in situations of military occupation. On the one hand, an occupying power will, by nature, be the governing authority of a territory, controlling the lives of the population. As such, their human rights are under its control, and it has clear legal obligations in this regard.³¹ On the other hand, LOAC has a clear set of detailed rules for regulating situations of military occupation.³² Again, in most cases this does not cause a direct contradiction, and the two bodies of law can work comfortably together. However, challenges do arise in a number of areas, the first of these being the extent to which the occupying power must go beyond non-interference with rights and provision of basic supplies, and whether it has the same scope of positive duties arising from human rights obligations as it would in its own territory. It would be unreasonable and impractical to pretend that an occupied territory – especially if it is on another continent – can immediately upon commencement of occupation come under the maximalist level of human rights obligations. While human rights obligations will apply, there must be a contextual approach to determining the level at which the

²⁸ Françoise Hampson, 'Detention, the "War on Terror" and International Law' in Howard M Hensel (ed), *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* (Ashgate 2005) 131, 142-5.

²⁹ 'While there are cases in which lack of adequate infrastructure and resources constitutes an impediment to the establishment of a proper detention regime, the dearth of legal norms - especially in non-international armed conflicts – also constitutes an important obstacle to safeguarding the life, health and dignity of those who have been detained.' ICRC, 'Strengthening Legal Protection for Victims of Armed Conflicts: Draft Resolution and Report' (October 2011) 9.

³⁰ CIHL r 87-105 with commentaries.

³¹ See cases cited in n 19.

³² See GCIV.

rights must be fulfilled. This does not absolve the occupying power from its obligations to respect, protect and fulfil the rights of the inhabitants. These obligations do, in principle, apply; but it does mean that each case must be examined in the context of the circumstances and that the level of obligations be interpreted in a manner that can be practically implemented.³³

The question of use of force during occupation is another area which raises challenges with regard to the interplay, as it also does in certain other types of military action such as peace support operations.³⁴ In both these situations, a military force is likely to be patrolling the streets in civilian areas. Indeed, it is recognised by military forces that operations of this type can require rules of engagement that resemble law enforcement rather than the direct resort to lethal force allowed by LOAC. However, LOAC does not provide the detailed rules on use of force for policing type activities, as these are found in the law enforcement and human rights framework.³⁵ The regulation of policing type activities carried out by the military amongst the civilian population would therefore have to draw, at least in part, from the relevant international human rights law guidelines on use of force.

One of the areas with significant repercussions but not always given adequate attention, is the potential impact of human rights law in relation to investigations of acts occurring in armed conflict. Although LOAC can require investigations in certain circumstances, there may be perceived differences between LOAC and human rights law in this regard. For example, while under LOAC there is a need for investigation if there appears to have been a violation which amounts to a war crime,³⁶ civilian deaths which appear to be lawful under LOAC (e.g. circumstances whereby it was indisputably within the proportionality formula) might fall outside this obligation;³⁷ there is also a question as to the type of investigation (if any) required

³³ For detailed analysis leading to this approach, see Noam Lubell 'Human Rights during Military Occupation' (2012) 885 *IRRC* 317.

³⁴ See the debates as reflected in the ICRC, 'Occupation and other Forms of Administration of Foreign Territory: Expert Meeting' (2012) 109-130.

³⁵ UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, UN Doc A/CONF.144/28/Rev.1 at 112 (1990); UN Code of Conduct for Law Enforcement Officials, UNGA Res 34/169 (17 December 1979).

³⁶ This is most clearly the case with regard to the grave breaches regime, but also goes beyond this and stems, for example, from the duties to ensure respect and suppress violations, and from customary international law; see analysis of customary international law in CIHL commentary to r 158; for examinations of the duty to investigate and a number of possible approaches to its implementation, see Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts' (2011) 14 *YBIHL* 37; Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 *Harvard National Security Journal* 31; Sasha Radin and Michael N Schmitt, 'Investigations under International Humanitarian Law', ch 33 in this volume; The Turkel Commission, '*Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*' (February 2013).

³⁷ 'The incidental death or injury of a civilian during an armed conflict, conversely, does not necessarily give rise to an automatic suspicion of criminality; it will be the context in which the incidental death or injury occurred that will determine whether there is a reasonable suspicion of the perpetration of a war crime. Any such reasonable suspicion will immediately trigger an investigation.' Turkel Commission (n 37) 102.

for violations of LOAC that do not amount to war crimes.³⁸ Human rights law, however, could arguably require an investigation for most civilian deaths,³⁹ and thus of incidents which might fall outside those requiring an investigation under LOAC. This potential disparity in the trigger for investigation is one of the areas in which the interplay between the bodies of law reveals a tension which is still in the process of being resolved.⁴⁰ Notwithstanding, human rights bodies have shown a willingness to accept that the precise shape of investigations conducted in the context of armed conflict cannot always reasonably be expected to meet the same standards as peace time domestic police investigations.⁴¹ Many aspects of an investigation, from collection of forensic evidence to using experts at the alleged scene of crime might be difficult – if not impossible – to fulfil on the battlefield.⁴² Once again, therefore, the obligation under human rights law does exist and can have an impact with regard to the obligations of the military, but the specificities of the obligation must be interpreted in context. A final point on this matter, is that the perceived ‘intrusion’ of human rights law investigations into armed conflict would most likely be avoided if the military ensured that breaches of LOAC were investigated and dealt with adequately and promptly as already required.⁴³ In practice, cases that come before human rights bodies tend to be of the type that would have required investigation also under LOAC, due to circumstances which raised allegations of breaching LOAC and not only human rights law.

3 Concurrent Application of Human Rights Law and the Law of Armed Conflict

As discussed, the potential impact of human rights law in areas regulated by LOAC is clear. What remains is the need to clarify their interplay and identify the manner in which the concurrent application can work in practice. The International Court of Justice played a key role in addressing the relationship between international human rights law and the law of armed conflict. It sought to clarify their concurrent application in the Advisory Opinions on the

³⁸ The Turkel Commission was of the opinion that war crimes require an *investigation*, while other violations require ‘some form of *examination*’. Ibid 99.

³⁹ *Isayeva, Yusupova and Bazayeva v Russia* (Applications nos 57947/00, 57948/00 and 57949/00, ECtHR, 24 February 2005) para 208; ‘The Court has held that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict’. *Al-Skeini v UK* (n 9) para 163-4.

⁴⁰ For suggestions for reconciling some of the tensions in the regulation of investigations, see Cohen and Shany (n 36).

⁴¹ ‘The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading inter alia to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.’ *Al-Skeini v UK* (n 9) para 168.

⁴² *ibid.*

⁴³ See n 36.

*Legality of the Threat or Use of Nuclear Weapons*⁴⁴ and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁴⁵ and in the *DRC v. Uganda case*.⁴⁶

In response to the discussion on the applicability of the right to life during armed conflict,⁴⁷ the Court stated in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* that:

the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁴⁸

The ICJ thereby acknowledged that while certain derogations are allowed, international human rights law continues to apply during armed conflicts. The judges affirmed the interconnectedness of international human rights law and the law of armed conflict. They offered the use of the *lex specialis* principle as a tool to articulate the concurrent application of the two fields of law, supporting the continued application of human rights law during conflict while granting some degree of primacy to LOAC over international human rights law at least in relation to the right to life.

The ICJ addressed the concurrent application of international human rights law and the law of armed conflict for a second time in the *Wall* opinion. The Court rejected the position held by Israel⁴⁹ that human rights treaties do not apply in the Occupied Territories due to the on-going armed conflict to which LOAC applies exclusively.⁵⁰ The judges used both LOAC and human rights law to support their conclusion in the *Advisory Opinion*, stating that:

⁴⁴ *Nuclear Weapons* (n 7).

⁴⁵ *Wall* (n 7).

⁴⁶ *DRC v Uganda* (n 7).

⁴⁷ *Nuclear Weapons* (n 7) para 24.

⁴⁸ *ibid* para 25.

⁴⁹ Israel, 'Implementation of the International Covenant on Economic, Social and Cultural Rights: Second Periodic Report', UN Doc E/1990/6/Add.32 (3 August 2001) paras 5-8.

⁵⁰ *ibid* para 102, citing the Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, 'Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory', UN Doc A/ES-10/248 (24 November 2003), Annex I, para 4: 'Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social

the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.⁵¹

The ICJ further suggested there are in fact three possibilities when considering how to articulate the concurrent application of international human rights law and LOAC:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.⁵²

While ultimately using the *lex specialis* principle to support its reasoning, the ICJ appeared to propose somewhat of a novel approach to clarify the interplay between the disciplines, suggesting that both branches will govern concomitantly.

The ICJ again addressed the interplay between LOAC and international human rights law in the *DRC v. Uganda* case in 2005.⁵³ Therein the judges reiterated their position held in the *Wall* and accordingly ‘concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration.’⁵⁴ Significantly, the ICJ did not this time mention that LOAC should be considered as *lex specialis*. In this case the Court appeared to advocate the use of a complementary approach to the concurrent application of international human rights law and LOAC, whereby each field should inform, rather than displace, the other.

Although the ICJ appeared to provide direction for addressing the interplay, its pronouncements lacked detail on how the interplay ought to be applied. The Court first proposed the *lex specialis* principle as a tool to articulate the concurrent application and subsequently suggested a complementary approach to the topic, but without developing the foundations of such a model. There is, therefore, a need for coherent legal reasoning supporting the articulation of the interplay between international human rights law and LOAC. The examination and critical appraisal of the theory of *lex specialis* is a vital step in this direction.

and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.’ See Israel, ‘Implementation of the International Covenant on Civil and Political Rights: Second Periodic Report’, UN Doc CCPR/C/ISR/2001/2 (20 November 2001) para 8. See also Committee on the Rights of the Child, ‘Summary Record of the 829th meeting’, UN Doc CRC/C/SR.829 (2002) paras 39-42. Therein Israel also rejects the applicability of the Convention on the Rights of the Child to the West Bank and the Gaza Strip.

⁵¹ *Wall* (n 7) para 106.

⁵² *ibid.*

⁵³ *DRC v Uganda* (n 7) para 216.

⁵⁴ *ibid.*

The *lex specialis* principle is remarkably vague and can be used to support several, and often diametrically opposed, arguments. The logic of this principle has been used by the USA, Israel and Russia to argue that in situations of armed conflict LOAC applies exclusively, displacing or excluding the whole international human rights framework.⁵⁵ In contrast, the *lex specialis* principle has been interpreted to mean that, depending on the situation at hand, either one of the legal frameworks could be the more specific one.⁵⁶ Finally, it has been used to support a combined application of the two fields.⁵⁷ Simply, the vagueness of the *lex specialis* maxim, and its consequential broad scope, allows this theory to be interpreted in all directions. This is the opposite of clarification, and is far from being a solution. In many cases, it also fails to offer a practical result. While it is correct to assert that the use of the LOAC framework is crucial to the assessment of the taking of life between combatants during international armed conflict, the *lex specialis* principle seems of less assistance for many other problems of co-application. For instance, the application of the *lex specialis* principle in cases of potential violations of the right to life is not readily transposable to situations of non-international armed conflict, where there is less agreement on the definition of individual status and associated rules of targeting, and LOAC norms therefore become less clear.⁵⁸ The relationship between LOAC and human rights law requires a complex cross-fertilisation that might need to combine a number of elements and rules from both fields at the same time. Similarly, in the case of detention during armed conflict, there is no simple solution of juxtaposing a single LOAC rule against a single human rights rule, and choosing between them. In such cases a complex myriad of rules must be taken into account simultaneously on matters such as the status and circumstances of the given detainee (prisoner of war, member of armed group, civilian in occupied territory, civilian in internal conflict, and

⁵⁵ These arguments were rejected by the HRC. See for instance HRC, ‘Concluding Observations: United States of America’, UN Doc CCPR/C/USA/CO/3/Rev.1 (18 December 2006); HRC, ‘Concluding Observations: Israel’, UN Doc CCPR/C/ISR/CO/3 (3 September 2010). The ICJ also reiterated the concurrent application of international humanitarian and human rights treaties, in response to Russia’s argument rejecting the application of the International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res 2106 (XX) (21 December 1965) 660 UNTS 195 on the basis that the dispute rather concerned international humanitarian law. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia) (Provisional Measures) (Order)* [2008] ICJ Rep 353, paras 79, 83, 95-97, 110-112.

⁵⁶ See for instance Report of the Office of the High Commissioner on the Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict, UN Doc A/HRC/14/40 (2 June 2010) para 14.

⁵⁷ For instance, in the context of targeted killing of suspected terrorists, Kretzmer proposed that ‘the applicable system must be a mixed model, which incorporates features of international human rights law.’ David Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?’ (2005) 16 *EJIL* 171, 171. See also Orna Ben-Naftali and Keren R Michaeli, ‘We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings’ (2003) 36 *Cornell ILJ* 233; Ben-Naftali and Shany (n 27); Marco Sassòli and Laura M Olson, ‘The Relationship between International Humanitarian and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts’ (2008) 871 *IRRC* 599, 626. For challenges with the mixed model approach see Yuval Shany, ‘Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror’ in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (OUP 2011); Kenneth Watkin, ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict’ (2004) 98 *AJIL* 1, 34.

⁵⁸ For a complete explanation of the categorization of members of non-state groups see Lubell (n 11) ch 6, s 1.5.

so on), the type of detention (administrative, preventative, on a criminal charge) and more. Likewise, it is unclear how the *lex specialis* principle could assist in articulating the interplay between LOAC and economic, social and cultural rights for example in relation to obligations concerning the right to health during occupation. Although LOAC contains health-related obligations, it is in international human rights law that the detailed understanding of the right to health is to be found.⁵⁹ The *lex specialis* principle is not a practical or workable model to articulate the complexity of the relationship between LOAC and human rights law.

Accordingly, closer inspection reveals that although *lex specialis* is an established and long-used principle that developed in other areas of law, it is neither an appropriate nor useful tool in the current context.⁶⁰ It has unfortunately become entrenched in the discourse and is mistakenly assumed to answer the complex question of concurrent application. Moreover, its uncritical acceptance has often become a method to avoid the ‘tedious’ elaboration of a detailed approach to clarify the interplay between the disciplines. There would be far greater chance of progress if the *lex specialis* principle were dethroned from its position as the primary tool for articulating the interplay between human rights and LOAC. Indeed, the Human Rights Committee has wisely left aside the *lex specialis*-based articulation of the relationship between international human rights law and LOAC, affirming that:

the Covenant [on Civil and Political Rights] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.⁶¹

Arguably, by discarding the reference to *lex specialis* in the *DRC v. Uganda* case, the ICJ has also retreated from the simplistic application of this principle, proposing an alternative approach more likely to respect the nature of each field of law. It has become clear that we must identify other avenues to develop and crystallise a complementary use of international human rights law and LOAC in order to operationalise their interplay in a practical manner.

Conclusion: Operationalising the Interplay between LOAC and Human Rights Law

An increasing number of bodies have adopted a complementary approach. For instance, in 1997, the Inter-American Commission on Human Rights in the *Abella* case,⁶² examined a petition regarding violations of the American Convention on Human Rights, during a situation alleging the summary execution, disappearance and torture of individuals following combat at

⁵⁹ For example, see CESCR, ‘General Comment no 14: The Right to the Highest Attainable Standard of Health (Art. 12)’, UN Doc. E/C.12/2000/4 (11 August 2000).

⁶⁰ Nancie Prud’homme, ‘Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?’ (2007) 40 *Israel LR* 356.

⁶¹ HRC, ‘General Comment no 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) para 11. See also HRC, ‘General Comment no 29’ (n 9) paras 3, 9, 11, 16.

⁶² *Abella v Argentina* (n 9)

the La Tablada army barracks between the Argentinian military and over 40 armed persons. The Commission explained therein the applicable legal framework⁶³ and in light of the facts qualified the events at La Tablada as a non-international armed conflict which ‘triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities.’⁶⁴ It used LOAC to decide whether the alleged violations were legitimate under human rights law, and on the basis of that answer ruled on violations of the American Convention. In their conclusions the Commission accordingly only stated violations of the American Convention, which were informed by the LOAC framework.

Institutions have also adopted a complementary approach in relation to the issue of detention. For example the ICRC *Customary International Humanitarian Law Study* provides in rule 99 that ‘[a]rbitrary deprivation of liberty is prohibited’⁶⁵ in international as well as non-international armed conflict. The wording of rule 99 uses terms that are found in the human rights framework rather than in humanitarian treaty law. A detailed framework for deprivation of liberty does not explicitly exist in humanitarian treaty law applicable in non-international armed conflict.⁶⁶ The study appears to state the need to rely upon human rights law to interpret the meaning of arbitrary deprivation of liberty in the context of non-international armed conflict.⁶⁷ Human rights law is used in the ICRC study to assess both the acceptable grounds for deprivation of liberty, as well as the necessary procedural requirements.⁶⁸ It uses human rights law to interpret LOAC in such a way as to include the principle of legality, as well as the stated procedural requirements otherwise absent from humanitarian treaty law. The ICRC study provides a strong example of a complementary application of human rights and LOAC.

The members of the UN fact-finding mission on Gaza established by the Human Rights Council in 2009⁶⁹ also adopted a complementary approach, for instance when examining allegations of killing of civilians involving a deliberate attack on police facilities which led to the death of 99 police officers.⁷⁰ It examined more specifically whether the police in Gaza needed to be regarded as part of the civilian population under LOAC, and whether Israel had respected the principle of distinction between civilians/civilian objects and combatants/military objectives as provided for under the LOAC framework. The report also discussed the violation of the right to

⁶³ *ibid* paras 149-153.

⁶⁴ *ibid* para 156.

⁶⁵ CIHL r 99.

⁶⁶ CIHL commentary to r 99. As it is noted in the ICRC study, GCI-IV common art 3 and APII rather provide for the humane treatment of civilians and persons *hors de combat*.

⁶⁷ CIHL commentary to r 99.

⁶⁸ CIHL commentary to r 99.

⁶⁹ HRC, ‘The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly Due to the Recent Israeli Military Attacks against the Occupied Gaza Strip’, UN Doc A/HRC/S-9/2 (2009). The President of the Human Rights Council announced in April 2009 the appointment of Justice Richard Goldstone as head the fact-finding mission, as well as three additional experts – Professor Christine Chinkin, Ms Hina Jilani and Colonel Desmond Travers. See UN, ‘Richard J. Goldstone Appointed to Lead Human Rights Council Fact-Finding Mission on Gaza Conflict’, Press Release (3 April 2009) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8469&LangID=E>.

⁷⁰ ‘Human Rights in Palestine and Other Occupied Arab Territories’, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc A/HRC/12/48 (25 September 2009) paras 33, 424-429.

life and prohibition of arbitrary killings under international human rights law. The report concluded that international human rights law and LOAC were jointly applicable to the situation in general, and also applied the appropriate rules of each field together, taking each other into account. Following this the report declared violations of the right to life under international human rights law only in relation to the individuals killed who were not legitimate targets under LOAC, and whose deaths came about in the context of a disproportionate attack under the latter body of law.⁷¹ The joint complementary application therefore produced a result in which there is no conflict of rules, but rather a mutually reinforcing conclusion.

The starting point of the complementary approach is that the operationalisation of the interplay cannot be made solely by comparing two opposing rules and choosing between them, but must be through an approach that respects the specificities of each field, where LOAC and human rights law apply in such a way as to feed into each other, and take each other into account when addressing a situation. The complementary approach is nuanced requiring a case by case concurrent application of LOAC and human rights law where each field is interpreted in light of the other. Although there are virtually endless potential scenarios, it is still possible – and vital – to identify in advance certain types of circumstances, such as detention or force during military occupation, and to reach a practicable agreed approach. It is suggested that, through practice and further clarification processes involving all stakeholders, agreement in principle can be reached over the best approaches to be tailored for specific types of situations. Ultimately, it is inescapable that the two legal frameworks apply concurrently, and the impact of human rights law on the regulation of armed conflict is palpable. While this does on occasion create tension between these bodies of law, in more situations than is usually assumed there are in fact available interpretations to apply them together without contradiction. For the difficult cases, the intricacy of the relationship is such that the *lex specialis* principle cannot provide a simple one-size-fits-all solution. There is a growing recognition of the need to continue and develop approaches for complementary application of LOAC and human rights law that is both practicable and recognises their respective objectives.

⁷¹ *ibid* para 1923: ‘that Israel, by deliberately attacking police stations and killing large numbers of policemen ... during the first minutes of the military operations, failed to respect the principle of proportionality between the military advantage anticipated by killing some policemen who might have been members of Palestinian armed groups and the loss of civilian life (the majority of policemen and members of the public present in the police stations or nearby during the attack). Therefore, these were disproportionate attacks in violation of customary international law. The Mission finds a violation of the right to life (ICCPR, article 6) of the policemen killed in these attacks who were not members of Palestinian armed groups.’